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WHETHER AN ESTABLISHMENT NOT A NUISANCE PER SE MAY BE ABATED AS A NUISANCE BECAUSE OF THE PARTICULAR LOCALITY.

Much difficulty and confusion will be removed from the mind of the lawyer in considering the subject of nuisances, if he will bear in mind that the locality of the alleged nuisance is often a controlling factor in the court's decisions whether the court so expresses it or not.

There are, indeed, many legitimate businesses of such a nature as to cause annoyance to those living in their vicinity, but being legitimate and necessary to the public welfare and not nuisances *per se*, are entitled to exist in such localities as are given up largely to business, although, if located in a purely residence district would be held to be nuisances. Therefore the rule of law is that whenever a locality loses its character as a place suitable for a place of residence, and becomes essentially a manufacturing neighborhood, where the business generally carried on is hostile to and inconsistent with its use as a place of residence, a court of equity will not interfere to prevent the carrying on of the business of manufacturing, even though the vibration, noise, smoke or other unpleasant concomitants render it impossible to use adjoining premises as a dwelling. Gilbert v. Showerman, 23 Mich. 58; Doellner v. Tynan, 38 How. Prac. 176. A resident, therefore, of a trading or manufacturing neighborhood is bound to submit to such ordinary personal annoyances and little discomforts as are fairly incidental to legitimate trading and manufacturing carried on in a reasonable way. Robinson v. Baugh, 31 Mich. 290.

But the fact that a certain place is a manufacturing town, does not justify an extraordinary use of the property, introducing a serious annoyance, in addition to those arising from the ordinary uses of property there. Mulligan v. Elias (N. Y.), 12 Abb. Prac. (N. S.) 259. In this case the court said: "The authorities meet and dispose of the notion that the fact that the district or town has factories as well as dwellings, or has the former somewhat in excess of the latter, is an answer to the just complaints of one who in his person, family and property suffers from a nuisance caused by the manufacturing business. Even when the smoke and noise, arising from the factories, some of which had existed for more than twenty years, had prevailed, causing serious annoyance to the inhabitants, relief will be granted against the party whose works introduced a new element, a material addition to what was bad enough before."

There is no question whatever when the district is purely residential. Thus it has been held that the operation of a machine and blacksmith shop devoted to boat repairing in a neighborhood otherwise given up to costly residences, established after the character of the locality as a residence district had been determined, will be enjoined. McMorran v. Fitzgerald, 106 Mich. 649, 64 N. W. Rep. 569, 58 Am. St. Rep. 511. In this case the court said: "Uses of property which might be improper in one locality may be proper in another. Thus a slaughter-house might be protected in a place remote from residences or places of business, though the land of an adjoining proprietor should not be free from noxious odors arising therefrom. But in a populous district, or in case that the adjoining proprietor should choose to erect a residence upon his premises, the slaughter-house would be or might become a nuisance. Smoke and noise which are common in cities would be intolerable in rural or suburban districts, and as such, might be excluded by the law. As long as the smoke and tumult are confined to portions of a city which are principally devoted to such business, little difficulty arises, and, though theoretically a resident of such locality may have the same rights to immunity from discomfort, usually his personal interest in the increase of values which results from occupation for business purposes satisfies him. But when one invades a suburban district with an offensive and noisy business, which from its nature is injurious to those having houses in the vicinity, merely because he can purchase land cheap, or because the location has peculiar advantages for his purpose, he takes the risk of being compelled to compensate the injured neighbors, or perhaps desist from the offensive use of the property."

NOTES OF IMPORTANT DECISIONS.

ORDINANCES — REASONABLENESS OF ORDINANCE IMPOSING A HEAVY LICENSE ON POOL TABLES.—The recent case of Wysong v. City of Lebanon, 71 N. E. Rep. 194, is interesting for its discussion of the important question as to the reasonableness of the imposition of a heavy license fee on trades or amusements which are "innocuous" or harmless in their nature or tendencies.

In this case the Supreme Court of Indiana held that an ordinance requiring an annual license fee of $250 for each pool table kept for hire was not unreasonable. In support of its decision, the court said:

"The keeping of pool tables for hire is a proper matter for the exercise of the police power possessed by the legislature. Moreover, such business serves no useful end, and while it may, perhaps, in some instances be conducted in such manner as to be innocuous, yet it is often the fact that the places where it is carried on, as was said by Cowen, J., in Tanner v. Trustees of Albion, 5 Hill, 121, 40 Am. Dec. 337, are the 'nurseries of vice and crime.' In fixing a license fee, even under a mere grant of power to regulate or to license, it is proper to take into account not only the direct expense, but all the incidental consequences that may be likely to subject the public to cost as a result of the carrying on of the business. Cooley on Tax. 409; Cooley, Const. Lim. (7th Ed.) pp. 283, 709; Burroughs on Tax. 162; Dillon, Munic. Corp. § 357; Tenney v. Lenz, 16 Wis. 566; State v. Treas. City of Plainfield, 44 N. J. Law, 118. As applied to harmful employments, it is to be inferred that the purpose of granting the power to license was to keep the business in leash, rather than to permit it to flourish. Emerick v. City of Indianapolis, 118 Ind. 279, 20 N. E. Rep. 279; City of Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. Rep. 857. In Thomassen v. State, 15 Ind. 449, it was decided that the exaction of a license fee of $50 per annum upon the business of retailing intoxicating liquors, under the law of 1859, p. 202, ch. 130, was a legitimate police regulation. It was held in Smith v. City of Madison, 7 Ind. 86, that an ordinance fixing a license fee of $50 per year for the keeping and operating of a bowling alley might be enacted under an authority to suppress or to restrain. It was indicated in that case that the license requirement was imposed as a restraint upon the business. In Wiley v. Owens, 39 Ind. 429, it appears that the city of Franklin had passed an ordinance fixing the license fee for retailing intoxicating liquors in said city at $500 per annum. The ordinance was passed under an authority to regulate and to license the business. It was held that the ordinance was not void, although it might operate incidentally as a tax upon the dealer or the consumer. In Sweet v. City of Wabash, 41 Ind. 7, it was decided that the grants of power last referred to did not authorize a city to fix a license fee which would be prohibitory, since such an ordinance would impinge upon another act. The authority granted the common council respecting the keeping of pool tables for hire is to 'regulate,' 'restrain,' 'license,' or 'prohibit.' We are not called on to consider a case where the arm of the council is shortened by another statute. Here the enactment which empowers the municipality to license the business in question has given to the corporation the entire gamut of legitimate authority—from the right to regulate to the power to prohibit. It is true that the latter authority is to be exercised by the fixing of penalties, yet, in view of the evident purpose of the legislature to grant to the municipality a broad discretion in the premises, and having in mind the character of the business to which the ordinance relates, we cannot say that the imposition of a $250 license fee was without the range of the discretion of the common council. The ordinance offered in evidence by appellant did not nullify the ordinance under which he was prosecuted."

MANSLAUGHTER—FAILURE OF PARENTS TO FURNISH MEDICAL ATTENDANCE TO THEIR CHILDREN.—Another state has been added, "*obiter* dictatorially" if we may coin an adverb, to the list of those states who hold the parents guilty of manslaughter for the death of their child consequent upon their failure to furnish medical attendance. State v. Chenoweth, 71 N. E. Rep. 197. In this case a father was prosecuted for involuntary manslaughter, for failure to furnish medical attendance to his sick child, as a result of which he died. In this particular case the trial court found the evidence insufficient to convict the defendant and therefore ordered a verdict of acquittal. The Supreme Court of Indiana, while affirming the judgment, on the state's appeal, goes out of its way to emphasize its views on the merits of the charge against the defendant. The views so expressed are not only interesting but authoritative at least to the extent of being the unanimous sentiments of the individual judges. The court said:

"Although we cannot, for the reasons stated, pass upon the merits of the question, it may not be improper, and perhaps will be useful, if we refer to some of the statutes and decisions pertaining to the question attempted to be presented in this appeal: In Reg. v. Wagstaffe, 10 Cox, C. C. 530, it was held that 'where, from conscientious religious conviction that God would heal the sick, and not from any intention to avoid the performance of their duty, the parents of a sick child refuse to call in medical assistance, though well able to do so, and the child consequently dies, it is not culpable homicide.' This case was decided in January, 1868, and in July of that year the first act in England upon the subject, so far as we are aware, was enacted (31 & 32 Vict. ch. 132, § 37). This act made it an offense for any parent wilfully to neglect to provide medical aid for his

child in his custody, and under the age of 14 years, whereby the life of such child should be, or was likely to be, seriously injured. In the case of Reg. v. Downes, 13 Cox, C. C. 111, it was held to be manslaughter where the child died from such neglect. In 1894 this act was amended by 57 & 58 Vict. ch. 41, so as to provide, among other things, that 'if any person over the age of sixteen years who has the custody, charge or care of any child under the age of sixteen years wilfully. * * * neglects such child * * * in a manner likely to cause such child unnecessary suffering or injury to its health * * * that person shall be guilty of a misdemeanor.' In Reg. v. Senior, 1 Law Reports Q. B. 283, the defendant was charged and convicted of manslaughter of his infant child, of which he had the custody. He was a member of a sect called the 'Peculiar People,' who objected, on religious grounds, to calling in medical aid, and to the use of medicine. As grounds for their religious belief, they relied on the Epistle of James, ch. 5, verses 14 and 15. It appears in that case that the defendant wilfully and deliberately abstained from providing medical aid and medicine which were necessary for his infant child, of the age of eight years and nine months who was suffering from diarrhea and pneumonia; he at the time knowing that the child was dangerously ill. It was shown that medical aid would have prolonged and probably saved the child's life, and that the defendant had the means to supply the same. As there was evidence in that case to establish that the defendant had wilfully neglected the child, in a manner likely to injure its health within the meaning of the act in controversy, and having thereby caused or accelerated its death, the court adjudged, under the circumstances, that he was rightly convicted of manslaughter. In that appeal Lord Russell, C. J., in his opinion, said: 'At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect.' In Rex v. Brooks, 9 British Columbia, 13, a conviction of manslaughter growing out of the neglect to provide minor children with the necessaries of life, was affirmed. The evidence in that case established that John Rogers belonged to a sect called 'Catholic Christians in Zion,' or 'Zionites.' One of the tenets of this sect is that it is contrary to the teachings of the Bible, and therefore wrong, to have recourse to medical aid and drugs in case of sickness. As a consequence of this belief, the accused omitted to provide his children with medical attendance and appropriate medical remedies when they were sick with diphtheria. The children in question were both under the age of six years, and were members of their father's family, and were wholly dependent upon him for support. He knew that they had diphtheria, and that it was a dangerous and contagious disease. His circumstances were such that he could have paid for medical attendance and medical remedies. It was proved that the disease caused the death of the children, and that the ordinary remedies would have prolonged their lives and in all probability would have resulted in their complete recovery. The court held in that case that medical attendance and remedies are necessary, and that any one legally liable to provide such was criminally responsible for his neglect to do so, both under the statute and at common law. The court further held that the conscientious belief that it is against the teachings of the Bible, and therefore wrong, to have recourse to medical attendance and remedies, furnished no excuse or justification for the defendant's neglect to provide them. In the case of People v. Pierson (N. Y.), 68 N. E. Rep. 243, the defendant was indicted for violating a section of the Penal Code of the state of New York which provides that 'A person who wilfully omits without lawful excuse to perform a duty imposed upon him by law, to furnish clothing, shelter or medical attendance to a minor * * * or neglects, refuses or omits to comply with any provisions of this section is guilty of a misdemeanor.' In that case the defendant was charged under this statute with having omitted, without lawful excuse, to perform a duty imposed upon him by law, in failing to furnish medical attendance to his minor child, and in refusing to allow her to be attended by a regular physician, when she was sick with, and suffering from, the disease of pneumonia. The excuse offered by the father of the child for not calling a physician was that he believed in 'Divine Healing,' which could be accomplished by prayer. He stated that he belonged to the 'Christian Catholic Church of Chicago,' that he did not believe in physicians, and that his religious faith led him to believe that the child would get well by means of prayer. He believed in diseases, but believed that religion was a cure of all disease. This excuse or justification on the part of the defendant for violating the statute in question was not sustained by the court, and his conviction below was affirmed. The court, in that appeal, in the course of its opinion, cited Schouler on Domestic Relations, p. 548, where the author, speaking upon the subject of what constitutes necessary maintenance, says: 'Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessaries.' Other authorities might be cited, but the above will suffice.

The question, as previously said, is one of public importance, and, if there is an absence of law in this state in respect to a case like this, the legislature should promptly deal with the matter by proper legislation."

WHEN AND IN WHAT CASES MAY THE OWNER OF ANIMALS, WHICH ARE NATURALLY TAME, BE LIABLE FOR THEIR MISCHIEVOUS OR WRONGFUL ACTS.

General Liability.—The general rule is that the owner of domesticated animals is not liable for injuries inflicted by them upon mankind unless he has knowledge of the vicious disposition of the offending animal;[1] and that as to their trespasses against property the owner is responsible therefor without knowledge of such mischievous disposition.[2] The foregoing statement is to be understood in the light of different authorities which apply specific principles to various classes of cases and with reference to different kinds of domestic animals. The law of torts classifies all animals under two heads: (*a*) Those that are *ferœ naturæ*, such as a lion, a tiger, a wolf, and, as said in May v. Burdett,[3] even "an ape or a monkey;" and likewise an elephant has been placed in the same class.[4] (*b*) Those that are *mansuetæ naturæ* or *domitæ naturæ*, such as oxen, horses, sheep, cattle, and dogs.[5] A man must keep a wild beast under complete control and captivity at his peril.[6] While it is not unlawful to keep beasts that are naturally ferocious and irreclaimable,[7] yet it is the imperative duty of the keeper to secure them in such manner as to absolutely prevent injury to others. The ferocious nature of a wild beast is sufficient to create notice to the keeper of the dangerous propensities of the animal.[8] The common law rule was unyielding that the owners of wild beasts were unqualifiedly liable for all injuries committed by them, no matter how carefully they may have been guarded, except that they may have been tamed and were practically tractable to all appearances and in that event the same might be taken into consideration in mitigation of damages.[9] In Cooley on Torts,[10] in commenting upon the case of Vredenburg v. Behan, *supra*, this statement is made: "It is no defense to claim for death by attack of a bear that he was partly tame, nor that he was provoked to attack by teasing of some person other than his victim." In the same note it is also said: "When wild animals are kept for some purpose recognized as not censurable, all we can demand of the keeper is that he shall take the superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him."

When an animal naturally tame becomes vicious or destructive outside of its nature. it is then placed, in legal effect, in the category of *ferœ naturæ*,[11] and the vigilance of the owner in restraining the same is no defense. But if a domestic animal suddenly, and without previous warning by act or otherwise, breaks through the bounds of domesticity and savagely attacks a person to the latter's injury, the owner is not necessarily liable, for he had no knowledge of the animal's vicious propensity.[12] The process of showing that

[1] Clowdis v. Fresno Flume, etc., Co., 50 Pac. Rep. 373; Warner v. Chamberlain (Del.), 30 Atl. Rep. 638; Klenburg v. Russell (Ind.), 25 N. E. Rep. 596; Decker v. Gammon, 69 Am. Dec. 99; Cooley on Torts (2d. Ed.), p. 403; Brooks v. Taylor, 31 N. W. Rep. 837; Spring Co. v. Edgar, 99 U. S. 645; Hallyburton v. Burke County Fair Assoc. (N. Car.), 26 S. E. Rep. 114, 38 L. R. A. 156; Muller v. Kesson, 10 Hun (N. Y.), 44; Dearth v. Baker, 22 Wis. 73; Sherfey v. Bartley, 4 Sneed (Tenn.), 58.

[2] Jaggard on Torts, Vol. 2, p. 854; Sprague v. Fremont, etc., R. Co. (Dak.), 50 N. W. Rep. 617; Bulpit v. Mathews (Ill.), 34 N. E. Rep. 525; Eames v. Salem, etc., R. Co. (Mass.), 96 Am. Dec. 676; Lorrance v. Hillyer (Neb.), 77 N. W. Rep. 755; Walker v. Bloomingcamp (Oreg.), 43 Pac. Rep. 175; Glidden v. Towle, 31 N.H. 147, 168; Morgan v. Hudnell (Ohio), 40 N. E. Rep. 716; Angus v. Radin, 5 N. J. L. 815; 3 Blackstone Comm. * 211; Rust v. Low, 6 Mass. 90; Bostwick v. Minn. & P. Ry. Co., 51 N. W. Rep. 781; Birket v. Williams, 30 Ill. App. 451; Vandergrift v. Rediker, 22 N. J. L. 185; Thompson on Law of Negligence, beginning p. 2; Cooley on Torts, pp. 402, 403; Hiltshauer v. Railway Co., 99 Ind. 486; McCormick v. Tate, 20 Ill. 334; D'Arcy v. Miller, 86 Ill. 102, 29 Am. Rep. 11, 12.

[3] 9 Q. B. 101.

[4] Filburn v. People's Palace & Aquarium Co., 25 Q. B. 258.

[5] 1 Amer. & Eng. Ency. Law (1st. Ed.), p. 584, *et seq.* and notes.

[6] May v. Burdett, *supra*; Van Leuven v. Lyke, 1 N. Y. 516, 49 Am. Dec. 346; Filburn v. People's Palace, etc., Co., 25 Q. B. 258; Vredenburg v. Behan, 33 La. Ann. 627.

[7] Scribner v. Kelley, 38 Barb. (N. Y.) 14.

[8] Keenan v. Gutta Percha, etc., Mfg. Co., 46 Hun (N. Y.), 544, affirmed in 24 N. E. Rep. 1096; Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

[9] Besozzi v. Harris, 1 F. & F. 92.

[10] 2d. Ed., p. 412, note.

[11] Hammond v. Melton, 42 Ill. App. 186; Blackman v. Simmons, 3 C. & P. 138; Chickering v. Lord, 32 Atl Rep. 773, 774. But contra is Worthen v. Love, 14 Atl. Rep. 461, which holds that if the owner exercises proper care and diligence in securing a vicious dog so as to prevent injury to others, he is not liable if the dog breaks through all discipline and commits a mischievous act.

[12] Hussey v. King (Me.), 22 Atl. Rep. 476, and cases there cited; Jaggard on Torts, Vol. 2, p. 855; Cox v.

the owner or keeper of a domestic animal had knowledge, or by reasonable diligence and care could have had knowledge of the animal's dangerous disposition or propensity is known as proving *scienter*.[13] It is to be understood that the question of *scienter* goes to injuries to persons almost exclusively and is not involved under the common law rule with reference to injuries to property caused by cattle and the like breaking through enclosures and invading adjacent fields, which will be discussed in a subsequent paragraph.

Scienter.—A single instance of an animal having injured a person takes it out of the category of animals *domitæ naturæ*, and that fact alone is sufficient to charge the owner with knowledge.[14] But in order to create liability it is not essential to prove a specific act or acts of mischief committed by the animal in question, or previous injury to others.[15] It is the propensity to commit the mischief which constitutes the danger;[16] and hence it is sufficient if the owner has seen or heard enough to convince a man of ordinary care and prudence of the animal's inclination to do the class of injuries complained of.[17] In Abbott' Trial Evidence, *supra*,[18] it is said: "Proof of savage and ferocious nature proves notice. Evidence that he (the owner) had chained it and warned persons of it, or procured or kept it to guard his premises, is competent to show notice."[19] If the owner has notice of the animal's vicious disposition, from its general habits and demeanor, so as to fairly apprehend that it might injure a person, that is sufficient to prove *scienter*. Evidence may be admitted of the general reputation of a dog's vicious nature in the neighborhood.[20]

In the case of a dog known to be ferocious by its keeper, it is unnecessary to show that it had previously bitten a person.[21] The keeper of such a dog must see to it that he is kept securely, or be responsible for all injury done by him.[22] In Godeau v. Blood, *supra*, which is a leading case, frequently cited and commented upon, Redfield, J., characterized the responsibility of the owner of a dangerous domestic animal as the "enforcement of a common moral duty, binding upon all men, that a man should so use his own property as not to wrong or injure others," and, further, that in order to establish a *scienter*, it is not necessary that the animal shall have "effectually mangled or killed at least one person," but that if the owner had knowledge of the dog's evil propensities which would give a man of reasonable care and vigilance ground to apprehend that the animal would injure persons, "then the duty of restraint attached," and to omit it would be negligence. In Buckley v. Leonard,[23] an action for damages for injuries inflicted by a dog, it appeared that the defendant "had kept his dog chained up in the day time, and in his store at nights," and the jury trying the case having found for the defendant, their verdict was set aside, the court sayiug: "The fact that he usually in the day time kept him confined, and in the night time kept him in his store, is strong evidence that he was aware that the safety of his neighbors would be endangered by allowing him to go at large." And identical with the last case quoted from is that of Warner v. Chamberlain,[24] where it was held that the fact that the owner commonly kept his dog enclosed or penned up was persuasive evidence that he knew or believed and had reason to believe that the dog was of a vicious nature.

Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is *prima facie* liable without proof of any negligence or fault in securing or taking care of it, for the gist of such an action is the keeping of the animal after knowledge of its mischievous disposition.[25] In Worthen v. Love, *supra*, and in

Burbridge, 13 C. B. (N. S.) 430-441. See also cases cited at note 1 hereof.

[13] Rapalje and Lawrence's Law Dictionary.

[14] Marsel, by next friend, v. Bowman (Iowa), 17 N. W. Rep. 176; Kittredge v. Elliott, 16 N. H. 79; Barnes v. Chapin, 4 Allen (Mass.), 444.

[15] Rider v. White, 65 N. Y. 54; Reynolds v. Hussey (N. H.), 5 Atl. Rep. 458.

[16] Reynolds v. Hussey, *supra*.

[17] Shear. & R. Neg., sec. 190; Abb. Trial Ev. 645; Keightlinger v. Egan, 65 Ill. 235; Buckley v. Leonard, 4 Denio, 500.

[18] p. 645.

[19] Citing Miller v. McKesson, 73 N. Y. 195, 199; Worth v. Gilling, L. R. 2 C. P. 1.

[20] Fake v. Addicks (Minn.), 47 N. W. Rep. 450; Meir v. Shrunk, 44 N. W. Rep. 209, involving a vicious bull; Murray v. Young, 12 Bush. 337; Keenanv. Hayden, 39 Wis. 558.

[21] Robinson v. Marino (Wash.), 28 Pac. Rep. 752, 28 Am. St. Rep. 50.

[22] Cooley on Torts, 2d. Ed., 404, 405; 2 Shear & R. Neg., 4th Ed., sec. 630; Godeau v. Blood, 52 Vt. 251.

[23] 4 Denio, 500.

[24] 30 Atl. Rep. 638 (Del.).

[25] Addison on Torts, 184; Partlow v. Haggarty, 35

Benoit v. Troy & L. R. Co.,[26] a more restricted rule is applied, but these cases do not follow the trend of the great weight of authorities.[27] In Quilty v. Battie,[28] it is said: "As soon as such animal (a dog) is known to be mischievous, it is the duty of the person whose premises it frequents to send it away or cause it to be destroyed." This rule is a little harsh, and it is manifest that the court in the case just quoted from did not contemplate all domestic animals in making that statement. It had application to dogs, and it is well enough to suggest that an examination of the authorities generally will disclose that the rule applicable to the mischievous acts of dogs are harsher and more sweeping than those recognized with reference to any other class of animals, except wild beasts. Some cases treat a savage dog as an outlaw and a common nuisance, liable to be killed by any one.[29] In People v. Van Horn,[30] it is said: "In consequence of the acknowledged excellence of some of their traits and their remarkable attachment to mankind, and on account at the same time of their liability to break through all discipline and act according to their original savage nature, and because, also, of their liability to madness, it has been customary always to make dogs the subject of special and peculiar regulations."[31] In some jurisdictions it is provided by statute that the owner or keeper of dogs shall be liable for their injuries to person or property, without regard to his knowledge of the animal's mischievous propensity.[32] And in many states statutes have been passed which enlarge the responsibilities of all persons who own, keep or harbor dogs.[33] In Indiana it is provided by a recent enactment of the legislature that "if any dog shall be found roaming over the country unattended by its master or owner, or his owner's agent, it shall be lawful to kill such dog."[34] The constitutionality of the section of the statute set out is doubtful as being contrary to certain provisions of the Indiana state constitution with reference to the titles of legislative acts.[35]

The fact that the animal committing injury does so in a playful mood is no defense. The law reserves no respect for the characteristics or good motives of domestic animals.[36] In Hathaway v. Tinkham,[37] it is held that the "intent of the dog is not material," for it is quite possible that "injury may be done by a dog, even with an affectionate intent." So, in State v. McDermott,[38] it is suggested that "a domesticated bear may hug a man until his ribs be broken. This may be the mode adopted by the animal to manifest his affection, yet if he had, on other occasions, previously shown his affection in that way, causing injury, * * * the owner would be liable." And in the same case, commenting upon Oakes v. Spaulding,[39] in which Mrs. Oakes was attacked and injured by a ram belonging to the defendant, it is said: "It did not cure the hurt, nor assuage the pain of the woman to be told that the ram, when he

Ind. 178. But see Worthen v. Love, 14 Atl. Rep. 461.

[26] 48 N. E. Rep. 524.

[27] In Benoit v. Troy & L. R. Co., 48 N. E. Rep. 524, a suit for damages produced by a team of horses running away, it was held that the mere fact that the team had run away about ten days before, did not necessarily make the animals *ferœ naturæ*, or prove *scienter*, because the horses in both instances were frightened by boys hallooing. See statement of Worthen v. Love, in note 11 hereof.

[28] 32 N. E. Rep. 47 (N. Y.).

[29] Brown v. Carpenter, 26 Ver. 638; Blackman v. Simmons, 3 Carr. & P. 138; Hinckley v. Emerson, 4 Cow. 351; Loomis v. Terry, 17 Wend. 496.

[30] 9 N. W. Rep. 246.

[31] Citing, Blair v. Forehand, 100 Mass. 136; Carter v. Dow, 16 Wis. 298; Mitchell v. Williams, 27 Ind. 62; Morey v. Brown, 42 N. H. 373; Woolf v. Chalker, 31 Conn. 121.

[32] Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175; Koestel v. Cunningham, 97 Ky. 421; Brewer v. Crosby, 11 Gray (Mass.), 29; Newton v. Gordon (Mich.), 40 N. W. Rep. 921.

[33] See Amer. & Eng. Ency. Law, First Edition, Vol. 1, p. 584, note 1, citing numerous authorities, and among others the following: Smith v. Montgomery, 52 Maine 178; Fairchild v. Bently, 30 Barb. (N. Y.) 147; Gries v. Zeck, 24 Ohio St. 329; Smith v. Cansey, 22 Ala. 568.

[34] Section 2860, R. S. 1901, Burn's, Indiana.

[35] Section 19 of Article 4 of the Indiana state constitution provides: "Every act shall embrace one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much as shall not be expressed in the title." There is nothing in the title to the act in question which would indicate any such provision as the one permitting the ruthless destruction of a dog for no other reason than that it is found roaming unattended by its master or master's servant, without reference to whether the animal was or had been committing any depradation.

[36] Boulester v. Parsons (Mass.), 36 N. E. Rep. 790; Denison v. Lincoln, 131 Mass. 236.

[37] 19 N. E. Rep. 18 (Mass.).

[38] 6 Atl. Rep. 653 (N. J.).

[39] 40 Ver. 347.

butted her, was only in one of his accustomed sportive moods."

Owner—Who May Be.—Whoever harbors or keeps a vicious animal may be the owner thereof in legal contemplation.[40] In Marsel, by next friend v. Bowman,[41] it was held that it is the duty of any person having charge of a vicious animal, with whose dangerous disposition he is acquainted, to restrain it, and if he fails to do so, the person injured may recover against him, whether he was the actual owner or merely a bailee. The keeper as well as the owner stand upon an equality so far as responsibility to the public is concerned. Thus, an administrator who paid the registration fee of a dog belonging to the estate of the decedent was regarded as the owner of the dog, and this was maintained under a statute which imposed a special liability upon the "owners" of dogs.[42] In Iowa it is expressly provided by statute that any person harboring a dog will be deemed the owner thereof.[43] And the word "owner" as used is held to contemplate any person who keeps a dog, whether as bailee or actual owner.[44] In Indiana it has been held that a third person as bailee, having in control an animal known to be dangerous, is responsible for its safe-keeping, as much as the owner, so far as the public is concerned.[45] In Hornbein v. Blanchard,[46] the defendants were husband and wife, and each strenuously denied ownership of the dog in question. The court held that they were liable regardless of actual ownership, if they kept the dog on their premises, and harbored him, with knowledge of his vicious propensities. The word "owner," as employed in cases of this kind, will include the person in possession or control of the animal.[47] Whoever befriends and gives succor and shelter to a vicious dog may incur liability for its mischievous acts. But in Fitzgerald v. Brophy,[48] where the defendant merely permitted a dog, which was a stray, to live under a building in his coal yard, it was held that such fact did not make the defendant a harborer of the animal to such an extent as to make him liable for its mischievous acts.

Imputed Knowledge.—A great many cases uphold the doctrine that the knowledge of servants and bailees of the vicious nature of an animal will be imputed to the owner.[49] In McGuire v. Ringrose, *supra*, and Bush v. Wathem, *supra*,[50] it is held that the owner of an animal is answerable for the damages it has caused, even while such animal is in the control of a kennel club. And in Clowdis v. Fresno Flume & Irrigation Company, *supra*,[51] it was held that the knowledge of servants, put in charge of a bull to drive him to a certain place, that he is vicious, is knowledge of the owner, so as to make the latter liable to a stranger who is injured by the animal, and the same case goes to the extent of holding that if the servants first learned of such vicious tendency while driving the bull to the place in question, and after obtaining such knowledge failed to take precautions to protect the public, their knowledge so acquired would be the knowledge of the owner for which the latter would be responsible in the event of injury. In Brown v. Green[52] it is held that the manager of a stable maintained by a certain number of persons is the servant of any one of the persons, so that the former's knowledge of the vicious character of a horse owned by such person, and kept in the stable, may be imputed to the owner; and further that the knowledge of the vicious disposition of a horse, by one employed to drive it in delivering goods, is notice to the owner of such evil propensity. So it has been held in a number of cases, involving a ferocious dog, that the knowledge of the wife is the knowledge of the husband.[53]

Defenses.—If the injured party invited the attack of a domestic animal[54] or voluntarily

[40] Hayes v. Smith (Ohio), 56 N. E. Rep. 879.
[41] 17 N. W. Rep. 176 (Iowa).
[42] McAdams v. Starr, 74 Conn. 85, 49 Atl. Rep. 897.
[43] Shulz v. Griffith, 72 N. W. Rep. 445.
[44] O'Harra v. Miller, 20 N. W. Rep. 760; Shulz v. Griffith, *supra*.
[45] Frammel v. Little, and Another, 16 Ind. 251.
[46] 35 Pac. Rep. 187 (Col.).
[47] Camp v. Rogers, 44 Conn. 298.
[48] 1 Pa. Co. Ct. Rep. 142.
[49] Brown v. Green, 42 Atl. Rep. 991; McGuire v. Ringrose, 41 La. Ann. 1029; Bush v. Wathem, 20 Ky. 731, 47 S. W. Rep. 599; Clowdis v. Fresno Flume & Irrigation Co., 50 Pac. Rep. 373; Brice v. Bauer, 108 N. Y. 428, 15 N. E. Rep. 695; Cooley on Torts, p. 406, and note.
[50] McGuire v. Ringrose, 41 La. Ann. 1029; Bush v. Wathem, 47 S. W. Rep. 599.
[51] 50 Pac. Rep. 373.
[52] 42 Atl. Rep. 991.
[53] Shear. & R. Neg., Sec. 630, and note thereto.
[54] Cooley on Torts, 346; Brown v. Green, 42 Atl. Rep. 991, 993; Marble v. Ross, 124 Mass. 44. See in particular, Fake v. Addicks (Minn.), 47 N. W. Rep. 450; Miller v. McKesson, 73 N. Y. 200, 201.

provoked a vicious animal, knowing the consequences, he is not entitled to recover.[55] But the mere fact that the defendant keeps a vicious dog which is in the habit of attacking passing teams, and which propensity is known to the plaintiff, does not require the latter to exercise any extra precautions in driving along the highway.[56] The public is entitled to act upon the presumption that all dangerous animals are properly confined, and, therefore, people are excused from any special precaution against such beasts, except when such persons are in a place without right, or where such beasts may rightfully and properly be kept.[57] But in Loomis v. Terry,[58] where the owner was held liable for damages done by his dog to the plaintiff's son, who at the time of the injury, was committing a trespass in hunting upon his grounds on Sunday, it is said: "There can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he takes due care to confine himself to necessity. But it has been held that in these and like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way."[59] There is a line of good authorities, however, which maintain that one may keep a watch-dog, and for its attacks upon trespassers may not be liable, in so protecting his home, garden and field;[60] but if the dog be vicious, and the owner has knowledge of that fact, and permits the dog to run at large upon the highway, he is liable for its depredations. The case of Hussey v. King,[61] is an elaborate and exhaustive one upon the question of contributory negligence in actions of this kind, and the court takes the position that negligence is not the gist of the action, and hence contributory negligence is not strictly a defense, and in discussing this point quotes from Lord Denman, C. J., in May v. Burdett, *supra*, as follows: "The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of want of care. * * * It may be, however, that if the injury were solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense by plea of confession and avoidance." In Woolf v. Chalker, *supra*, an action for the bite of a dog, it was held that contributory negligence applicable to actions founded upon the negligence of the defendant was not applicable to that case. In Muller v. McKesson, *supra*, three defenses were urged to an action for damages on account of a dog bite, viz.: (*a*) that the plaintiff was guilty of contributory negligence; (*b*) that the plaintiff knew the character of the dog and by remaining in the employ of defendant thereby assumed the risk; (*c*) that the injury was caused by a fellow-servant in neglecting to chain the dog. Church, C. J., said: "As negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defense. These terms are not used in a strictly legal sense in this class of cases, but for convenience. * * * The owner cannot be relieved from liability by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences." All three of the above defenses were overruled. The same doctrine was adhered to in Lynch v. McNally.[62]

A great many courts cling to the doctrine of contributory negligence in actions of this kind, and require freedom from the same to be averred in the complaint.[63] As suggested by Judge Cooley:[64] "If a man heedlessly places himself on the premises of another, in the way of a bull, which he knows is fierce and dangerous, he has no lawful ground of

[55] Brooks v. Taylor (Mich.), 31 N. W. Rep. 837, page 838, and cases cited; Woolf v. Chalker, 31 Conn. 130, and cases cited.

[56] Jones v. Carey (Del.), 31 Atl. Rep. 976.

[57] Earnhart v. Youngblood, 27 Pa. St. 331; Fairchild v. Bentley, 30 Barb. (N. Y.) 147.

[58] 17 Wend. 496.

[59] See page 499 of that case.

[60] State v. Remhoff (N. J.), 26 Atl. Rep. 860; 1 Hill Torts, 544; 1 Add. Torts (Wood's Ed.), secs. 261, 263; Perkins v. Mossman, 44 N. J. L. 579.

[61] 22 Atl. Rep. 476 (Maine).

[62] 73 N. Y. 347.

[63] Williams v. Moray, 74 Ind. 25; Dockerty v. Hutson, 125 Ind. 101. See Graham v. Payne, 122 Ind. 403, which is an exhaustive case on the question of negligence of defendant, etc.; Chickering v. Lord, 32 Atl. Rep. 773, 774; Quimby v. Woodbury, 63 N. H. 370; Meir v. Shrunk (Iowa), 44 N. W. Rep. 209; Twigg v. Ryland, 62 Md. 380; Carpenter v. Latta, 29 Kan. 591; Weide v. Theil, 9 Ill. App. 223; Cooley on Torts, Second Edition, page 407.

[64] Cooley on Torts, 2d Ed., page 407.

complaint if he is gored." In Quimby v. Woodbury, *supra*, it is held that the owner of a vicious animal is not liable if the injured party by his negligence provoked the attack, or by ordinary care could have prevented the assault. But in Fake v. Addicks, *supra*, where one inadvertently stepped upon a dog, which was vicious, and thereby gave the animal an opportunity to demonstrate its dangerous disposition, it was held that such act on the part of the plaintiff did not constitute contributory negligence. It must be conceded that a great many cases, in applying the principle that one who keeps an animal with knowledge of its vicious nature does so at his peril, go so far as to permit recovery under circumstances which would seem to have a coloring of contributory negligence.[65] And in Wood on Nuisances this sweeping statement is made; "and he (the owner) is liable, even though the injury results from the carelessness of the person injured, or if in the day time, even though he was a trespasser, etc."[66] This statement is made with reference to the owner of a domestic animal keeping the same after knowledge of its vicious propensities.

Trespasses of Domestic Animals.—At common law every one was bound to keep his cattle upon his own land, and was liable for injuries committed by them while trespassing upon the lands of others, whether such lands were cultivated or not,[67] and for injuries committed to real or personal property while so trespassing, the owner was liable without reference to whether he had knowledge of any vicious propensity possessed by the offending animal.[68] Jaggard on Torts,[69] says: "There is, at common law, an absolute liability for all damages consequent upon the gratification of such instinct. (That is the instinct of cattle and the like to roam and invade adjacent fields.) Such damage includes, not only trespass on and injury to real estate, but also injury to person or personal property. In an action for the latter kind of injury, it is not necessary to allege and prove *scienter* on the part of the owner where it is alleged and proved that injury was committed where the animal was negligently permitted by such owner to trespass on the plaintiff's premises." At common law every man was bound to keep his cattle in his own field at his peril.[70] In Chunot v. Larson, where a dog, while trespassing on the plaintiff's lands, killed a cow, it was held that the owner was liable for the damage, although he had no previous knowledge of the animal's vicious propensity. But in Morgan v. Hudnell,[71] it was held the owner of a domestic animal is not ordinarily liable for injuries to persons perpetrated by a trespassing animal, unless he has knowledge of its savage nature, or there are circumstances warranting a court or jury to believe that he had knowledge or by the exercise of ordinary care and precaution could have had knowledge of such propensity; but that the owner is liable for trespasses of domestic animals when they break through a close and injure real or personal property without reference to the owner's knowledge of the dangerous traits of the offending animals. And of like import are the authorities contained in this note.[72] The common law rule, however, is curtailed and obviated in a great many ways by statutory provisions in most states relating to fencing, and the maintaining of partition fences, and township regulations with reference to allowing stock, at certain times and under certain conditions, to run at large.

The foregoing authorities upon the various propositions discussed need no further elaboration, but from them it can readily be perceived that the general liabilities of the kind contemplated by the subject of this article have been practically determined along uniform lines, with the exception of a few cases which are more or less affected by legislative

[65] Barnum v. Terpenning (Mich.), 42 N. W. Rep. 967. See also 44 N. W. Rep. 209; Boulester v. Parsons (Mass.), 36 N. E. Rep. 790; Denison v. Lincoln, 131 Mass. 236; Fake v. Addicks, 47 N. W. Rep. 450.

[66] Wood, Nuisances, sec. 766, p. 872.

[67] Lorance v. Hillyer, 77 N. W. Rep. 755; Rust v. Low, 6 Mass. 90; Ricketts v. Railroad Co., 12 Eng. Law & Eq. 520; Birkett v. Williams, 30 Ill. App. 451; Vandergrift v. Rediker, 22 N. J. Law, 185; Bostwick v. Minneapolis & P. Ry. Co. (N. Dak.), 51 N. W. Rep. 781.

[68] Morgan v. Hudnell (Ohio), 40 N. E. Rep. 716; Angus v. Radin, 5 N. J. Law, 815; 3 Bl. Comm. 211.

[69] Vol. II, pages 854, 855.

[70] McCormick v. Tate, 20 Ill. 334; D'Arcy v. Miller, 29 Am. Rep. 11, 12; Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

[71] 40 N. E. Rep. 716 (Ohio).

[72] Thompson on the Law of Negligence, beginning at p. 2; Klenburg v. Russel (Ind.), 25 N. E. Rep. 596; Cooley on Torts, pp. 402, 403 (2d Ed.).

enactments prevailing in the jurisdictions involved. The necessity of proving *scienter* by direct or circumstantial evidence in actions for personal injuries is firmly established, although by some statutes proof of the same is in a way obviated. But such statutory provisions are wholly arbitrary and at variance with the plainest principles of justice. They have been strictly construed, and *scienter* continues to be a conspicuous element in actions of that kind unless expressly and unequivocally eliminated by statute.[73] Upon the question or contributory negligence, in actions for personal injuries, the authorities are not at all harmonious, but the majority of the cases and textwriters recognize that if the injured party invited or brought about his injuries through his own fault, he should be precluded from recovery, even though the owner knew of the vicious propensity of the animal in question. One thing is to be remarked upon, and that is the tendency of the courts, and likewise of a great many legislative enactments, to place "dogs" under the particular ban and surveillance of the law, and to hold the owners and keepers of dogs to a greater degree of responsibility than in any other class of domestic animals, although, as Senator Vest, of Missouri, is reputed to have said: "A man's dog stands by him in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry winds blow, and the snow drives fiercely, if only he can be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of the pauper master as if he were a prince. When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journeys through the heavens."

WALTER J. LOTZ.

Muncie. Indiana.

[73] Kertschake v. Ludwig, 28 Wis. 430; Osincup v. Nichols, 49 Barb. (N. Y.) 495; Wormley v. Gregg, 65 Ill. 251; Elliot v. Herz, 20 Mich. 202; Murphy v. Preston, 5 Mackey (D. C.), 514.

JUDGMENT — JUDGMENT OF REVERSAL BY APPELLATE COURT FOLLOWED BY NONSUIT AS RAISING AN ESTOPPEL BY VERDICT.

SPRING VALLEY COAL CO. v. PATTING.

Supreme Court of Illinois, June 23, 1904.

A judgment of an appellate court reversing the judgment of the trial court and granting a new trial, and the subsequent entry of a nonsuit by the trial court, did not constitute a final judgment, so as to raise an estoppel by verdict.

A decision of the United States Circuit Court of Appeals, on reversing a judgment for plaintiff and remanding the case for a new trial, that the person whose negligence caused the injury for which suit was brought was a fellow servant with plaintiff, does not govern the disposition of a new action brought by plaintiff in the state courts after suffering a nonsuit in the United States Circuit Court.

HAND, J.: This is an appeal from a judgment of the appellate court for the first district affirming a judgment for $10.000 recovered by the appellee against the appellant in the circuit court of Cook county for a personal injury sustained by the appellee while in the employ of the appellant as a coal miner. The declaration contained a number of counts, and in various forms alleged a willful violation of the mines and miners' act (2 Starr & C. Ann. St. 1896, p. 2716, ch. 93), by the appellant, in failing to provide a sufficient brake with which to control the cage upon which the appellee was being lowered to the bottom of its shaft at the time of his injury, whereby said cage fell and he was injured; also in failing to furnish a sufficient light at the bottom of its shaft, down which the appellee was being lowered at the time he was injured, to enable him to get off the cage with safety, whereby he was injured; also charged appellant with negligence, as at common law, in so carelessly, negligently, and recklessly operating its machinery that it lost control of the cage upon which appellee was being lowered into its mine, by means whereof the cage, with appellee thereon, was precipitated to the bottom of its shaft, whereby he was injured.

The accident occurred on the morning of November 24, 1893, while appellee and a number of other coal miners were being lowered by appellant into its mine for the purpose of mining coal, upon a cage operated in a shaft 360 feet deep. There was no light at the bottom of the shaft, and the only light in the shaft was that furnished by the miners' lamps. The machinery for operating the brake which controlled the speed of the cage failed to work, and the cage dropped to the bottom of the shaft. The lamps of the miners became extinguished. Appellee was thrown from the cage at the bottom of the shaft. The cage, which weighed, with the men thereon, something like 3,500 pounds, rebounded, and the appellee, while attempting in the darkness to save himself from injury, got one of his legs beneath the cage, and his leg was so crushed that

it became necessary to amputate the same, and he was otherwise injured. It is undisputed that the failure of the brake which controlled the speed of the cage to work was due to the fact that the engineer did not expel from the engine which operated the brake the cold water produced by the condensation of steam during the time the engine had been standing idle, as was his custom and duty to do before attempting to lower the cage.

A suit upon the same cause of action was, prior to the bringing of this suit, brought by the appellee against the appellant in the United States Circuit Court for the Northern District of Illinois, wherein he recovered a verdict and judgment for the sum of $10,000, which judgment, on appeal to the United States Circuit Court of Appeals, was reversed, and a new trial granted. 86 Fed. Rep. 433, 30 C. C. A. 168. The case was redocketed in the United States Circuit Court, and, when it was called for trial, the plaintiff not appearing, the court empaneled a jury to try the case, which jury, under the direction of the court, returned a verdict of not guilty, upon which verdict a judgment was rendered in favor the defendant. 93 Fed. Rep. 98. Upon writ of error the United States Circuit Court of Appeals reversed said judgment (98 Fed. Rep. 811, 39 C. C. A. 308), and, in accordance with the mandate of that court, the United States Circuit Court set aside the judgment rendered upon the verdict of not guilty, and dismissed the suit for want of prosecution, and within a few days thereafter appellee began this suit. The defendant pleaded not guilty and the statute of limitations. The appellee filed a replication to the plea of the statute, setting up the pendency of the cause of action in the United States Circuit Court, and the disposition thereof, to which replication the court overruled a demurrer; and, no exception having been taken to the ruling of the court in that regard, the action of the court in overruling said demurrer is not raised in this court.

It is first contended as a ground for reversal in this court that the decision of the United States Circuit Court of Appeals constitutes an estoppel by verdict upon the question of the right of appellee to recover in this case against the appellant upon the ground of the negligence of the engineer of the appellant in failing to expel from the brake engine the cold water produced by the condensation of steam during the time the engine had been standing idle, as was his custom and duty to do before attempting to lower said cage into the mine, on the ground that the United States Circuit Court of Appeals, when the case was therein pending, held, as a matter of law, that the appellee and the engineer of the appellant were fellow servants, and there could be no recovery by appellee against appellant on the ground of the negligence of said engineer, by reason of the fact that such relation existed between them at the time the appellee was injured. We do not agree with this contention, as the law is well settled that an estoppel by verdict can be based only upon a final judgment and the judgment of the United States Circuit Court of Appeals reversing the judgment of the United States Circuit Court and granting a new trial, and the nonsuit which followed, was not a final judgment.

In the case of City of Aurora v. West, 7 Wall. 82, 19 L. Ed. 42, Mr. Justice Clifford, speaking for the court, said: "Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action. Consequently, where the action was discontinued or the plaintiff became nonsuit, or where, from any other cause, except, perhaps, in the case of a retraxit, no judgment or decree was rendered in the case, the proceedings are not conclusive."

In Bucher v. Cheshire Railroad Co., 125 U. S. 555, 8 Sup. Ct. Rep. 974, 31 L. Ed. 795, an action at law was brought in the United States Circuit Court for the District of Massachusetts for damages for injuries sustained by the plaintiff through defendant's negligence while a passenger on its railway. Plaintiff had previously brought a similar action in a state court in Massachusetts, where he recovered judgment, which was reversed, on appeal, by the supreme court of that state, and the cause was remanded for a new trial; it being held in that court that at the time of his injury plaintiff was traveling in violation of the Sunday laws, which barred a recovery Afterward the plaintiff became nonsuit, and instituted the second action in the United States Circuit Court. On the trial in the latter court the defendant invoked the judgment of the Supreme Court of Massachusetts on the Sunday law as an estoppel. The United States Circuit Court held that the same question having been submitted to the jury in the trial in the state court, and having been passed upon by the supreme court of the state, it did not consider there was evidence sufficient to go to the jury upon that subject. The action of the court in that regard was assigned as error in the United States Supreme Court. The court, in disposing of such assignment, said: "Upon this point we are of opinion that the court below ruled correctly. It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which the ruling of the state court was made; and we do not place the correctness of the determination of the circuit court in refusing to permit this question to go to the jury upon the ground that it was a point decided between the parties, and therefore *res judicata* as between them in the present action, but upon the ground that the supreme court of the state, in its decision, had given such a construction to the meaning of the word 'charity' and 'necessity' in the statute as to clearly show that the evidence offered upon that subject was not sufficient to prove that the plaintiff was traveling for either of those purposes."

In Gardner v. Michigan Central Railroad Co.

150 U. S. 349, 14 Sup. Ct. Rep. 140, 37 L. Ed. 1107, the plaintiff, an employee of the defendant, sued the defendant in an action at law for damages occasioned by the alleged negligence of the defendant. He had previously brought a similar action in the state court in Michigan, where he recovered judgment, which on appeal was reversed by the Supreme Court of Michigan, and a new trial granted, on the grounds that, upon the facts proved, plaintiff was guilty of contributory negligence, and that the negligence conducing to cause his injuries was that of a fellow servant. Upon the case being remanded, the plaintiff became nonsuit, and thereupon commenced a second action in the United States Circuit Court for the Western District of Michigan; and upon the trial defendant contended that the said judgment of the Supreme Court of Michigan precluded the plaintiff from maintaining that action, but the Supreme Court of the United States, on appeal to that court, overruled such contention. That court said: "Counsel for the plaintiff in error does not contend that the judgment of the Supreme Court of Michigan operated as a bar to this action, but he insists that that judgment precluded 'the plaintiff from successfully maintaining a new action against the defendant upon evidence tending to prove only the same state of facts which the evidence before the supreme court of the state tended to prove.' This assumes a final adjudication on matter of law binding between the parties, and, treating the judgment reversing and remanding the cause as final, applies it as an estoppel, notwithstanding the fact that a nonsuit was subsequently taken. We cannot concur in this view, and are of opinion that the circuit court was not obliged to give any such effect to the proceedings in the state court."

In Illinois Central Railroad Co. v. Benz, 108 Tenn. 670, 69 S. W. Rep. 317, 58 L. R. A. 690, 91 Am. St. Rep. 763, a case very similar to the one at bar was presented to the court for decision. In that case, in an action for personal injuries, plaintiff recovered a judgment in the United States Circuit Court, which was reversed by the United States Circuit Court of Appeals, and the case was remanded for a new trial, on the ground that the injury occurred through the negligence of a fellow servant. Upon the case being redocketed in the United States Circuit Court, plaintiff was nonsuit, and thereafter started a new suit in a state court of Tennessee. Defendant set up the reversal by the United States Circuit Court of Appeals as an estoppel in bar of the action in the state court. The Supreme Court of Tennessee, upon review of the foregoing cases, held that the decision of the United States Circuit Court of Appeals did not operate as an estoppel in the state court.

In Holland v. Hatch, 15 Ohio St. 464, the action was at law upon a bill of exchange. A previous action had been brought upon the same bill in a state court in Indiana, where the plaintiff had recovered in the trial court; but on appeal the Supreme Court of Indiana reversed and remanded the case for further proceedings, whereupon the plaintiff became nonsuit, and thereupon brought the second suit in Ohio, where the defendant invoked the said judgment of the Supreme Court of Indiana as an estoppel. On appeal to the Supreme Court of Ohio it is said (page 468): "It seems to us that when the judgment of the Indiana circuit court was reversed in the supreme court of that state, and the cause remanded again in the circuit court for further proceedings, the case stood in the circuit court as it did before the trial or judgment. The judgment of the circuit court had become a nullity by the reversal. The judgment of the supreme court was the only thing left to estop the parties, and that simply estops them from denying that the judgment below was reversed and the cause was remanded. And the final judgment below seems to estop them from denying that the case ended in a nonsuit, and not in a judgment upon the merits."

Great reliance is placed by the appellant upon the case of Chicago Theological Seminary v. People, 189 Ill. 439, 59 N. E. Rep. 977, as an authority sustaining its position that the decision of the United States Circuit Court of Appeals should be held to work an estoppel upon the appellee in this case. That decision was based upon the view that the judgment in the case of People v. Theological Seminary, 174 Ill. 177, 51 N. E. Rep. 198, relied upon as an estoppel, was a final judgment, and it was so treated by the court. The court said (page 448, 189 Ill., page 980, 59 N. E. Rep.): "The judgment rendered by this court in the case last referred to was not merely a judgment reversing and remanding the cause for further proceedings, but it was a judgment which reversed the judgment of the county court, and remanded the cause for further proceedings in accordance with the views herein expressed; that is, in accordance with the views expressed in the opinion in that case. * * * A judgment rendered by this court reversing and remanding a cause for further proceedings in accordance with the views expressed in the opinion rendered is a final judgment, so far as the questions decided in the opinion are concerned." The decision, therefore, in Theological Seminary v. People, *supra*, is not an authority sustaining the position that the decision of an appellate court reversing a case and remanding the same for a new trial, in which case the plaintiff afterwards submits to an involuntary nonsuit, can be pleaded in another suit commenced upon the same cause of action as an estoppel, and is not in conflict with the authorities above referred to.

When a cause is reversed by an appellate tribunal and remanded for a new trial, the principles announced by the appellate tribunal in its opinion, on a retrial of the case in the court to which the case is remanded, must control; but where, upon a remandment, the cause is dismissed, or the plaintiff suffers a nonsuit, and a new ac-

tion is brought upon the cause of action in another forum, the principles of law announced by said appellate tribunal will not necessarily control in the decision of the case in the new forum. In Gardner v. Michigan Central Railroad Co., *supra*, it was held that the responsibility of the appellee in that case to the appellant, as an employee, was involved, which responsibility was controlled by matters of general law, and, that, in applying the law to the case then before the court, it was the duty of the court to apply the law of the forum wherein the case was then pending, and it was not the duty of the court to apply the law as announced by the Supreme Court of Michigan. The same holding was made in Illinois Central Railroad Co. v. Benz, *supra*. It was not, therefore, the duty of the state court to apply the rule upon the question of fellow servants announced by the United States Circuit Court of Appeals in this case, as the rule as to what constitutes the relation of fellow servants between servants of a common master is a matter controlled by general law, and the law upon this subject is different in the federal courts from what it is in this state, as administered by the courts of this state.

Affirmed.

NOTE.—*Conclusiveness of Judgment Vacated or Reversed by Appellate Court.*—The argument of the court in the principal case is supported by the authorities. Thus a decision by the supreme court reversing a judgment, and granting a new trial for insufficiency of the evidence, is not *res adjudicata* as to the evidence on appeal from the new trial. Galveston, etc., Ry. Co. v. Arispe, 5 Tex. Civ. App. 611, 24 S. W. Rep. 33; Best v. Nix, 6 Tex. Civ. App. 349, 25 S. W. Rep. 130. So also it has been held that a reversal on appeal of an order dismissing a complaint on demurrer without touching the merits, is not an adjudication that property in litigation, which had been turned over to defendant by the trial court on such dismissal, belonged to the plaintiff. Phelps v. Elliott (C. C.), 35 Fed. Rep. 455; Wadhams v. Gay, 73 Ill. 415. So also we call attention to a case, very similar to the principal case, in which it was held that a final judgment is not *res adjudicata* in a subsequent action between the same parties, where it is reversed and the case dismissed, under the mandate of the reviewing court. Mills County v. Brown County (Tex. App.), 30 S. W. Rep. 476. It is therefore the general rule that where a verdict and judgment have been set aside for the purpose of a new trial, they are not, in general, evidence for any purpose in a subsequent trial of the same cause. Delannay v. Burnett, 9 Ill. (4 Gilman) 454: Baker v. Hess, 53 Ill. App. 473; Sargent v. Hampden, 38 Me. 581; Richardson's Lessee v. Parsons (Md.), 1 Har. & J. 253; Wood v. Genet (N. Y.), 8 Paige, 137; Ridgely v. Spenser (Pa.), 2 Bin. 701; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. Rep. 111. So also the judgment on appeal, adjudging that the debt should be scaled, and sending the cause back for a new trial is not final. Omohundro's Extr. v. Omohundro (Va.), 27 Grat. 824. So also where a judgment rendered in one suit has been reversed on error in the appellate court, it cannot be relied on as an adjudication in another suit, when the judgment in the latter suit is brought to this court for review, although such former judgment was in force and unreversed at the time of the rendition of the judgment sought to be reviewed. Zanesville Gaslight Co. v. City of Zanesville, 47 Ohio St. 35, 23 N. E. Rep. 60. A judgment which has been declared by the supreme court utterly invalid is rightly excluded from evidence in another case, whatever may be the purpose of its introduction. Agnew v. Adams, 26 S. Car. 101, 1 S. E. Rep. 414; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. Rep. 111.

Where, however, on appeal in an action by a discharged employee, to recover for the unexpired term under a contract to render "satisfactory service," a judgment for plaintiff was reversed on the ground that his employers were the sole judges whether the services were satisfactory, on a new trial, where the evidence was the same, it was proper to direct a verdict for defendants. So also in Holbert v. Alford (Tex. Sup.), 12 S. W. Rep. 77, it was held that an action against an administrator to recover the value of lands sold by him as such administrator under letters alleged to have been fraudulently procured cannot be maintained after a judgment revoking said letters of administration has been previously reversed on appeal in action for that purpose.

CORRESPONDENCE.

SCANDALIZING THE COURT AS A CONTEMPT INDEPENDENT OF A CAUSE PENDING.

To the Editor of the Central Law Journal:

Your comments, 59 Cent. L. J. 121, on the Supreme Court of Missouri, for its decision in State v. Shepard, 76 S. W. Rep. 79, do the court as well as yourself great injustice. If you had carefully read the decision in the Shepard case you certainly would not have made the statement that "the Supreme Court of Missouri by an *obiter dictum* revived in their own favor that old relic of monarchial government, the offense of *scandalum magnatum*." The court did not revive any such doctrine, and expressly in the opinion disclaimed any purpose of doing so.

Shepard was arraigned before the court for contempt in publishing an article in his newspaper grossly reflecting upon the integrity of the court for its decision in Oglesby v. Missouri Pac. Ry. Co., 76 S. W. Rep. 623. The decision in the Oglesby case was rendered June 15, 1903. Shepard's article was published June 19, 1903, four days after the decision was announced. It will be seen by reference to the case that a rehearing was denied in the Oglesby case November 3, 1903. That case at the time of the publication of the contemptuous article was, therefore, still pending in the supreme court. Every case is pending in an appellate court during the time allowed for filing a petition for rehearing, and, if such petition is filed within the time, until there is ruling thereon. Fishback v. State (Ind.), 30 N. E. Rep. 1088, 1901; *In re* Chadwick (Mich.), 67 N. W. Rep. 1071. You are therefore, mistaken in assuming that Shepard's article was published after the Oglesby case had been disposed of in the supreme court. *Ex parte* Green, 81 S. W. Rep. 723, cited by you, is not in point. There the publication complained of had no reference to any case whatever, pending or disposed of. The decisions are uniform that courts have a right to protect themselves by proceedings for contempt against assaults upon their integrity made with reference to a pending case. Shepard's article was grossly scandalous and contemptuous.

Even if the decision so outrageously assailed had been wrong, it would not mitigate his offense; but the decision appears to have been correct. Oglesby, while a brakeman on a freight train, received an injury by the train being wrecked, to recover damages for which he brought an action against the railway company. In his petition he alleged that the wreck was caused by a defective car placed in the train. At the trial it was proved that, while there was a defective car in the train, it had nothing whatever to do with the accident. He was not, therefore, entitled to recover on the negligence charged in his petition. If the wreck was occasioned by the negligence of the defendant the true ground thereof should have been averred. He could not, of course, recover on an alleged ground of negligence which had nothing whatever to do with the accident. The fault, if any, may have been his or his attorney's, in not declaring upon the true ground of negligence. A plaintiff cannot recover upon a specification of negligence alleged in his petition but not proved, even though he has a valid cause of action upon some other ground of negligence. A recovery in every case must be *secundum allegata et probata*. Courts, in actions for personal injuries, as well as in other cases, are too often blamed for omissions and mistakes in pleadings which they are powerless to correct and which they cannot disregard without becoming themselves law makers and making a law that may be supposed to do justice in each case without regard to precedent or the unskillfulness with which the case is presented for their decision. Where a party having a meritorious cause of action, fails in its prosecution, the blame is more often that of his attorney than of the court.

The CENTRAL LAW JOURNAL, to which I have been a subscriber for over thirty years, is, as a rule, remarkably fair in its comments upon the courts. I am surprised that it should in this instance have made such a singular departure from its usual custom.

Lafayette, Ind. E. P. HAMMOND.

EDITOR'S REPLY:

We hasten to thank our correspondent for this opportunity to make clear our position on this question which he and probably others of our subscribers have misapprehended.

Our correspondent quotes us quite correctly when he repeats our statement that "the Supreme Court of Missouri, by an *obiter dictum* revived in their own favor that old relic of monarchical government, the offense of *scandalum magnatum*." We are surprised, however, that he did not understand our use of the term "*obiter dictum*." We did not say that the court decided any such question. In fact in twice commenting on the court's decision in this case we admitted its absolute correctness as to the actual facts involved, but denied the *obiter dictum* contained in the opinion of the court to which reference has been made by our correspondent's quotation. Thus, for instance, in 57 Cent. L. J. 101, we said: "Undoubtedly the Supreme Court of Missouri is correct in its ruling that a case, although decided, in which a motion for a new hearing has been made, is still pending, and that therefore the publication of any article reflecting upon the court's decision, or calculated to embarrass the court in its consideration of the motion for a rehearing, is a contempt of court." And in that connection we cited the cases of *In re* Chadwick and Fishback v. State cited by our correspondent. But in the same editorial, just referred to, we took up the question of the correctness of the court's *obiter dictum* that the offense of *scandalum magnatum*, was a sufficient ground to punish for contempt independent of a case pending, and denied that such was the law.

If our correspondent will again carefully read the opinion of Judge Marshall in the Shepard case, which we quote in 57 Cent. L. J. 402, he will be convinced of the justice of our earnest protest. In that paragraph in which the opinion refers to Lord Hardwicke's division of contempt into three divisions (first, scandalizing the court; second, abusing parties and witnesses before the court; third, abusing the court as to a case pending), Judge Marshall makes the following clear and unambiguous assertion: "This distinction has been overlooked in some of the adjudicated cases, and hence the error they have fallen into of saying that the contempt must relate to a cause that is still pending, and if the cause is disposed of, that will be no contempt which would have been a contempt if it had occurred while the cause was pending. The theory of such cases is that the act had a tendency to injuriously affect the rights of a party litigant in a pending litigation, or had a tendency to embarrass, although it might not actually influence the court in the determination of a pending cause. It must be obvious to the discriminating mind that such cases fall properly under the second or third class pointed out by Lord Hardwick, *supra*, but that they do not cover the whole field, for there is still the first kind of a contempt, to-wit, scandalizing the court itself, in which the public is primarily interested, and as to which the injury is just as great whether it referred to a particular pending case, or only to the court as an instrumentality of government."

The above quotation is the statement of the court to which we have taken serious exception. True it is a statement not necessary to the decision rendered in the case, but that to our mind does not mitigate the error involved in it. A false principle, indeed, very often makes its first appearance in the insidious form of an *obiter dictum*, and unless vigorously resisted in its earlier manifestations takes root and flourishes like a rank weed scattering its seeds of error in every direction.

We criticised in exactly the same manner the case of *In re* Chadwick, in which the Michigan supreme court, while correctly deciding that a case is pending on a motion for a rehearing, goes outside of the facts to assert its opinion that the power of the court to punish for contempt was not limited to cases pending See 57 Cent. L. J. 102.

After this explanation we believe our correspondent will agree with us that our contention in this matter is fair and just, and that it is certainly supported by the great weight of authority cited in the references herein referred to. That the judiciary is entitled to any more consideration in respect to the offense of *scandalum magnatum* than the executive or legislative departments has nothing in reason or logic to support it. The individual members of the court should have no greater rights in cases of libel than the governor or other officers of the state government. No halo of immunity from public criticism should surround the heads of the state's judiciary while other servants of the people, equally as honorable, must stand forth in the broad light of day open to attacks of adverse criticism and searching investigation on the part of the press and the people. The judiciary are but men, and therefore are as open to corrupting influences as those in control of any other of the co-ordinate branches of government, and like them, need the deterring influence of free public criticism. Like them, also, they should have their individual actions for libel. Certainly, no greater right to shut off adverse criticism can be given to them without throwing wide open the door to the corruption of the judiciary.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Dissolution of Corporation Plaintiff.—Where a corporation plaintiff was dissolved before the action was tried, the defendant cannot proceed to trial, and, after waiting until a judgment in its favor has been reversed on a writ of error and the cause remanded for a new trial, file a plea setting up such dissolution in abatement.—L Bucki Lumber Co. v. Atlantic Lumber Co., U. S. C. C. of App.. Fifth Circuit, 128 Fed. Rep. 332.

2. ABSENTEES—Time of Taking Appeal.—Where a suit is brought by a resident partner, and an appeal taken in the name of the firm is dismissed, and not renewed within the year prescribed in case of residents, the nonresident universal legatee of one of the partners, acquiring the claim *pendente lite*, will not be allowed to appeal.—S. Blum & Co. v. Wyly, La., 36 So. Rep. 202.

3. ACCOUNT—Principal and Agent.—A court of equity will not take jurisdiction of an action for an accounting when the accounts are all on one side and no discovery is sought or needed.—Graham v. Cummings, Pa., 57 Atl. Rep. 943.

4. ACTION—Continuance to Accommodate Accounting Executrix.—Refusal of the trial court to continue an accounting by an executrix, pending the determination of the title to certain real estate belonging to testator by a federal court, held not error.—Phillips v. Phillips, Adm'r., Ky., 80 S. W. Rep. 826.

5. ACTION—Malicious Prosecution.—An action for malicious prosecution cannot be joined with an action for slander, under Civ. Code, § 83, sub-div. 5.—Tandy v. Riley, Ky., 80 S. W. Rep. 776.

6. ADMIRALTY—Suit in Rem.—A claimant, who contests a suit *in rem*, is liable for interest on the damages awarded libelant, and for costs, although they increase the amount beyond the stipulation given for the vessel's release.—The Southwark, U. S. D. C. ,E. D. Pa., 129 Fed. Rep. 171.

7. ADMIRALTY—Value of Sunken Vessel—The finding of a commissioner as to the value of a vessel sunk in collision, made on conflicting evidence, will not be disturbed, unless error or mistake is clearly apparent.—Watts v. United States, U. S. D. C., S. D. N. Y., 129 Fed. Rep. 222.

8. ADVERSE POSSESSION—Rights Retained by Grantor.—Where owner of land has granted a right of way through the same to a railroad company, his right to a private crossing over such right of way, where the same is necessary for the convenient use of his two parcels of land lying on either side, held not barred by the statute of limitations of 21 years.—Cincinnati, H. & D. Ry. Co. v. Wachter, Ohio, 70 N. E. Rep. 974.

9. AGRICULTURE—Sequestration of Crop.—The privilege, though unrecorded, resulting from the furnishing of supplies to a plantation for the making of a crop takes precedence of that acquired by one under contract which he records, who subsequently furnishes supplies necessary to the making of the crop.—Southern Grocer Co. v. Adams, La., 36 So. Rep. 226.

10. ALIENS—Deportation.—A proceeding for the deportation of an alien, under Act March 3, 1891, ch. 551, 22 Stat. 1086 [U. S. Comp. St. 1901, p. 1299], not commenced until more than a year had elapsed since his last entry into the United States, held barred.—*In re* Russomanno, U. S. C. C., S. D. N. Y., 128 Fed. Rep. 528.

11. ALIENS—Habeas Corpus in Chinese Exclusion Cases—Refusal of right of entry into the United States of Chinese persons alleging citizenship held not reviewable on *habeas corpus* in federal courts, at least till final decision of Secretary of Commerce and Labor on appeal, in case of decision by immigration officers adverse to admission of alien.—United States v. Sing Tuck, U. S. C. C., 24 Sup. Ct. Rep. 621.

12. APPEAL AND ERROR—Duty to Request Instructions.—An appellant cannot complain of the court's instruction as omitting features essential to appellee's recovery, where he failed to present and request the giving of an adequate instruction.—Cornwell v. St. Louis Transit Co., Mo., 80 S. W. Rep. 744.

13. APPEAL AND ERROR—Law of the Case.—On appea from a final decree, no questions being presented that were not decided adversely to appellant on a former appeal, the decree will be affirmed.—Tampa Waterworks Co. v. City of Tampa, Fla., 36 So. Rep. 174.

14. APPEAL AND ERROR—Parties to Action for Division of Fees.—Where one of several attorneys entitled to a fee collected and withheld it, all the attorneys held properly made parties to an action by one to recover the amount agreed to be paid him.—Harrison v. Murphy, Mo., 80 S. W. Rep. 724.

15. APPEAL AND ERROR—Pauper's Oath.—It is proper to dismiss an appeal, where the pauper's oath filed in lieu of the statutory bond is shown to be untrue, and appellant is shown to be amply able to give the bond.—Cook v. Burson & Gaines, Tex., 80 S. W. Rep. 871.

16. APPEARANCE—Waiver of Question of Jurisdiction—The appearance of defendants unconditionally at th return term of the writ and obtaining leave to answer i a waiver of the question of jurisdiction over the person—Harrison v. Murphy, Mo., 80 S. W. Rep. 724.

17. ASSOCIATIONS—Service on Agent.—Under Practice Act (P. L. 1903, p. 545), § 40, service on agent of unincorporated association, though he is not general agen held sufficient —Saunders v. Adams Exp. Co., N. J., 57 Atl. Rep. 899.

19. ATTORNEY AND CLIENT — Dissolution of Corporation.—Attorneys for minority stockholders in litigation seeking a sale of the corporation's property to pay lien hereon, held not entitled to fees payable out of the proceeds of the property.—Lamar v. Hall & Wimberly, U S. C. C. of App., Fifth Circuit, 129 Fed. Rep. 79.

20. BAILMENT—Bailee's Right to Maintain Trespass.—A bailee for hire of services may maintain trespass, trover, or conversion for the disturbance of his possession by the wrongdoer, and recover the value of the property as damages.—National Surety Co. v. United States, U. S. C. C. of App., Eighth Circuit, 129 Fed. Rep. 70.

21. BANKRUPTCY—Assignment of Errors.—Orders and decrees in proceeding in bankruptcy cannot be reviewed by writ of error.—Lockman v. Lang, U. S. C. C. of App., Eighth Circuit, 128 Fed. Rep. 279.

22. BANKRUPTCY—Compensation of Receiver.—Where a receiver appointed under an involuntary petition subsequently dismissed by the court was still in possession of the property when the defendants were adjudicated bankrupts by another court, the authority passed to the latter to fix and allow the compensation of the receive

—*In re* Sears, Humbert & Co., U. S. C. C. of App., Second Circuit, 128 Fed. Rep. 275.

23. BANKRUPTCY—Concealment of Assets.—Where a bankrupt knowingly concealed an interest in his grandfather's estate, and omitted the same from his schedules, to which he made a false oath, he was not entitled to discharge.—*In re* Breiner, U. S. D. C., N. D. Iowa, 129 Fed. Rep. 155.

24. BANKRUPTCY—Debts of Married Woman.—Business obligations of a married woman engaged in business for herself in Florida, though not a free trader, held debts, within Bankr. Act July 1, 1898, ch. 541, §§ 1, 36.—Macdonald v. Tefft-Weller Co., U. S. C. C. of App., Fifth Circuit, 128 Fed. Rep. 381.

25. BANKRUPTCY — Dismissal of Involuntary Petition. —An involuntary petition in bankruptcy, by three creditors, will not be dismissed on the application of two of them, against the objection of the third.—*In re* Lewis, U. S. D. C., D. Del., 129 Fed. Rep. 147.

26. BANKRUPTCY—Landlord's Lien.—Where a landlord had a lien on a bankrupt's stock and fixtures only, under Laws Pa. 1891 (P. L. 122), and the stock, fixtures, and license were sold for a sum not apportionable, the landlord held not entitled to the payment of a year's rent in full from the proceeds of the sale.—Keyser v. Wessel, U. S. C. C. of App., Third Circuit, 128 Fed. Rep. 281.

27. BANKRUPTCY — Liquidated Damages. — Where claimant corporation sustained no actual damages by the breach of a bankrupt's contract to merge its business, good will, and assets, by the latter's becoming a bankrupt, claimant was not entitled to prove liquidated damages provided by the contract as a claim against the bankrupt's estate.—Northwest Fixture Co. v. Kilbourne & Clark Co., U. S. C. C. of App., Ninth Circuit, 128 Fed. Rep. 256.

28. BANKRUPTCY — Re-opening Estate.—While a court of bankruptcy has power to re-open the estate of a bankrupt to permit the trustee to maintain an action to recover concealed assets, the granting of an application therefor rests in its discretion, and its action will not be reversed, except for an abuse of discretion.—*In re* Goldman, U. S. C. C. of App., Second Circuit, 129 Fed. Rep. 212.

29. BANKRUPTCY — Selection of Trustee.—Votes voluntarily cast by creditors for a trustee cannot be rejected merely because the candidate is ineligible and could not be approved by the court; and where by counting such votes no election was made, and there is no request for a second vote, the referee is authorized to appoint a trustee himself.—*In re* Machin, U. S. D. C., E. D. Pa., 128 Fed. Rep. 315.

30. BANKRUPTCY—Suit to Set Aside Fraudulent Conveyance.—A trustee in bankruptcy, seeking to set aside a transfer of property alleged to have been made by the bankrupt fraudulently as against creditors, may appropriately proceed by bill in equity.—Thompson v. First Nat. Bank, Miss., 36 So. Rep. 65.

31. BANKRUPTCY — Who May Maintain Involuntary Proceedings.—To entitle a creditor to maintain a petition in bankruptcy against his debtor, he must have been a creditor when the act of bankruptcy charged was committed.—Brake v. Callison, U. S. C. C. of App., Fifth Circuit, 129 Fed. Rep. 201.

32. BANKS AND BANKING—Campaign Expenses as a Consideration for Note.—A note executed by the nominee of a political party for his campaign assessment and for an assessment to raise funds to defend a contest held based on a sufficient consideration.—Day v. Long, Ky., 80 S. W. Rep. 774.

33. BANKS AND BANKING — Depositor's Guaranty of Check.—A bank has no right, without a depositor's consent, to apply his deposit to the payment of the check of a third person, drawn in favor of a fourth, and guaranteed by the depositor.—O'Grady v. Stotts City Bank, Mo., 80 S. W. Rep. 696.

34. BANKS AND BANKING—Relation with Depositors.—A bank is bound to honor the checks of its depositor, and incurs no liability in so doing, although it knows of circumstances from which it could discover that he is violating his trust.—Interstate Nat. Bank v. Claxton, Tex., 80 S. W. Rep. 604.

35. BENEFIT SOCIETIES — Repayment of Premium.—One bringing suit to be reinstated in a beneficiary association held not entitled to repayment of premiums paid by him.—Murray v. Supreme Hive Ladies of Maccabees of the World, Tenn., 80 S. W. Rep. 827.

36. BILLS AND NOTES — Mutilation.—For breach of an agreement by a bank to sell a note with the name of a certain indorser thereon, the buyer's remedy is in *assumpsit*, and not in case or trover.—Chapman v. Niantic Nat. Bank, R. I., 57 Atl. Rep. 934.

37. BOUNDARIES—Establishment.—In re-establishing a boundary line, where indications fail, the rule is to reach the point of destination by the line of the shortest distance —Leonard v. Smith, La., 36 So. Rep. 101.

38. BROKERS—Discharge.—The relation between a real estate broker and an owner of property employing him is that of principal and agent, and the latter may discharge the former at any time.—Cadigan v. Crabtree, Mass., 70 N. E. Rep. 1033.

39. BROKERS—Fraud on Holder of Stock.—Stockbroker held liable for inducing plaintiff by false representations to hold stock until it declined in value.—Fottler v Moseley, Mass., 70 N. E. Rep. 1040.

40. CARRIERS—Directing Verdict.—In action to recover for injuries to passenger, the court need not direct a verdict for defendant, where there was evidence of a substantial character bearing on the general issue as to defendant's negligence.—City and Suburban Ry. of Washington v. Svedborg, U. S. S. C., 24 Sup. Ct. Rep. 656.

41. CARRIERS—Evidence as to Collision.—In an action by a street car passenger for injuries in a collision evidence as to whether other passengers were injured was competent as tending to establish the force of the impact, which bore on the question of the motorman's negligence.—Mullin v. Boston Elevated Ry. Co., Mass., 70 N. E. Rep. 1021.

42. CARRIERS—Joint Liability for Injury to Passenger. —Where a passenger was injured by an explosion of gas, due to the failure of an employee of the gas company to shut off gas from car tanks which he was filling under a contract with the railroad company, the carrier and the gas company were both liable.—Chicago, R. I. & T. Ry. Co. v. Rhodes, Tex., 80 S.W. Rep. 869.

43. CARRIERS—Limitation of Liability.—Limitation of liability in contract of carriage held a good defense in an action against the carrier for the destruction of the freight, notwithstanding Const. § 196—Cleveland, C., C. & St. L. Ry. Co. v. Druien, Ky., 80 S. W. Rep. 778.

44. CARRIERS—Live Stock Shipment. — Contract for shipment of live stock containing no stipulation as to time of delivery, law implies a reasonable time.—Southern Ry. Co. in Kentucky v. Railey Bros., Ky., 80 S. W. Rep. 786.

45. CERTIORARI—Procedure.—Where judgment is ordered up for review under Const. art. 101, at the instance of one of the parties, to correct a supposed error, the opposing litigant, who has made no complaint, cannot have the judgment amended for his benefit.—Ware v. Couvillion, La., 36 So. Rep. 220.

46. CHAMPERTY AND MAINTENANCE—Adverse Possession.—Where land is sold by parol, the price to be paid in the future, and the purchaser enters into possession, such possession does not become adverse, so long as any part of the price remains unpaid.—Smith v. Klay, Fla., 36 So. Rep. 54.

47. CHATTEL MORTGAGES—Effect of Possession.—A chattel mortgage, authorizing the mortgagor to retain possession, but providing for daily payments on the mortgage from the proceeds of the sale of the property, held not fraudulent on its face.—Dugan v. Beckett, U. S. C. C. of App., Fifth Circuit, 129 Fed. Rep. 56.

48. COMMERCE—Foreign Corporation.—Ky. St. 1903, § 571, requiring corporations doing business in Kentucky to file an appointment of an agent on whom process might be served, held not unconstitutional as an alleged state regulation of interstate commerce.—Com-

monwealth v. Parlin & Orendorff Co., Ky., 80 S. W. Rep. 791.

49. COMMERCE—Selling Through Agency in Foreign State.—A foreign corporation, selling goods in the state through an agency, is not reqired to obtain a permit to do business in the state.—Hallwood Cash Register Co. v. Berry, Tex., 80 S. W. Rep. 857.

50. CONSPIRACY—Straw Bail.—In a prosecution for conspiracy to defraud the United States by the execution of straw bail, the government was not required to prove that the accused did not appear on the date specified.—Radford v. United States, U. S. C. C. of App., Second Circuit, 129 Fed. Rep. 49.

51. CONSTITUTIONAL LAW—Recovery Against One of Several Defendants.—In a suit against an employer and his employees, charged with joint and concurring negligence, the employer held not deprived of his property without due process of law by recovery against him alone.—Southern Ry. Co. v. Carson, U. S. S. C., 24 Sup. Ct. Rep. 609.

52. CONSTITUTIONAL LAW—Restricting Use of National Flag in Advertising Matter.—Pen. Code, § 640, prohibiting use of United States and state flags for advertising, held a violation of the Const., art. 1, § 6.—People v. Van De Carr, N. Y., 70 N. E. Rep. 965.

53. CONTRACTS—Receivers.—A contract to pay a receiver for the use of his name and official title in certain suits brought by a purchaser of a part of the assets held contrary to public policy. — National Exch. Bank v. Woodside, Mo., 80 S. W. Rep. 715.

54. CONTRACTS - Rescission on Ground of Intoxication. —One seeking to set aside a contract on the ground that he was intoxicated at the time it was made must rescind within a reasonable time and place the other party *in statu quo*.—Fowler v. Meadow Brook Water Co., Pa., 57 Atl. Rep. 959.

55. CONTRACTS - Suit by Municipality.—Where a member of a city council participates in contracts involving the use by individuals of city property, and is himself the principal beneficiary, he cannot urge as a defense to the suit on the contract that it was against good morals and public policy.—Town of Morgan City v. Dalton, La., 36 So. Rep. 208.

56. COPYRIGHTS — Damages for Infringement.—In a suit in equity for infringement of copyright, there can be no recovery in the way of damages beyond the gains and profits which the defendant is shown to have realized from the infringement.—Social Register Assn. v. Murphy, U. S. C. C., D. R. I., 129 Fed. Rep. 148.

57. CORPORATIONS—Designation of Defendant.—A corporation may be sued by its corporate name, and, if summons has been actually served in the manner required by statute, a defect in naming the corporation is amendable.—Saunders v. Adams Exp. Co., N. J., 57 Atl. Rep. 899.

58. COSTS—Who Liable For.—The costs become a part of the judgment, where plaintiff has settled them, and, when allowed, are protected thereby in favor of the judgment creditor.—State v. New Orleans Debenture Redemption Co., La., 36 So. Rep. 205.

59. COUNTIES—Contract of District Attorney.—A county held not liable on contract of the district attorney for examination by a surgeon of a human stomach for poison.—Jones v. Sunflower County, Miss., 36 So. Rep. 188.

60. CRIMINAL EVIDENCE—Statement of Co-offenders. —Where two defendants jointly participate in the commission of an offense, declarations of one, though in the absence of the other, held admissible against both.—People v. Strauss, 88 N. Y. Supp. 40.

61. CRIMNAL TRIAL—Absence of Accused.—Where, after dinner recess, the jury were called before defendant was brought into court, and on his absence being discovered, he was brought in and the jury again called, there was no ground for reversal.—McNish v. State, Fla., 36 So. Rep. 175.

62. CRIMINAL TRIAL—Bill of Exceptions.—Where one general exception is made to instructions stating distinct propositions of law, the court will not consider such exception, if any one was correct.—Parnell v. State, Fla., 36 So. Rep. 165.

63. CRIMINAL TRIAL—Credibility of Accused.—Where defendant offered himself as a witness in his own behalf, it was not error for the court to charge that, in considering his testimony, the jury should consider the very grave interest which he had in the case.—Alexis v. United States, U. S. C. C. of App., Fifth Circuit, 129 Fed. Rep. 60.

64. CRIMINAL TRIAL—Error in Written Charge Supplied Orally.—Where the judge used written charges, and certifies that an omission in a written charge was supplied by him orally, and the charge as amended is correct, no error is committed.—Davis v. State, Fla., 36 So. Rep. 170.

65. CRIMINAL TRIAL—Evidence Against One of Several Conspirators Jointly Tried.—Where, in the prosecution for conspiracy against several, evidence was held admissible as against one only, it could not be made the subject of an exception on the part of the others.—Radford v. United States, U. S. C. C. of App., Second Circuit, 129 Fed. Rep. 49.

66. CRIMINAL TRIAL—Judicial Notice of Population.—Courts will take judicial notice of the population of a city of the state.—State v. Page, Mo., 80 S. W. Rep. 912.

67. CRIMINAL TRIAL—Reasonable Doubt.—The state must prove beyond a reasonable doubt the degree of the crime, as well as the other facts of the crime itself.—Galloway v. State, Fla., 36 So. Rep. 168.

68. DEATH—Cheerfulness of Deceased Irrelevant.—In an action for death of a boy eight years of age, evidence as to his cheerfulness was irrelevant.—Di Prisco v. Wilmington City Ry. Co , Del., 57 Atl. Rep. 906.

69. EJECTMENT—Recovery of Easement.—Grant of exclusive privilege held not a conveyance of land for the recovery of the possession of which ejectment could be maintained.—Conover v. Atlantic City Sewerage Co., N. J., 57 Atl. Rep. 897.

70. EQUITY—Multiplicity of Suits.—Suit for cancellation of notes given by 57 persons held within equity jurisdiction, on theory of multiplicity of suits.—Hightower & Crawford v. Mobile, J. & K. C. R. Co., Miss., 36 So. Rep. 82.

71. ESTOPPEL—Aagainst State.—The state can be estopped from asserting her right to her own property only by legislative act.—State v. Paxson & Cannon, Ga., 46 S. E. Rep. 872.

72. EVIDENCE—Fraudulent Representation as to Age. —Public registers are competent evidence on the questions of age and pedigree.—Murray v. Supreme Hive Ladies of Maccabees of the World, Tenn., 80 S. W. Rep. 827.

73. EVIDENCE — Self-serving Declaration. — A self-serving declaration of a husband as to his ownership of goods attached as his property, held inadmissible as against his wife, claiming title to the property independent of her husband.—Vermillion v. Parsons, Mo., 80 S. W. Rep. 916.

74. EXECUTORS AND ADMINISTRATORS — Entries in Books.—Entries made by decedent in book held incompetent on the issue as to whether decedent had agreed to give plaintiff a certain sum of money for services on his (decedent's) death.—Roberge v. Bonner, 80 N. Y. Supp. 91.

75. EXECUTORS AND ADMINISTRATORS — Powers of Testamentary Trustee.—Appointment of testamentary trustee as administrator *de bonis non* held to give no power not otherwise possessed to convey any portion of the trust estate.—Cox v. Shelby County Trust Co., Ky., 80 S. W. Rep. 789.

76. EXECUTORS AND ADMINISTRATORS — Right to Inherit.—Plaintiffs, having no right to inherit from the succession, cannot inquire into the methods followed in settling the succession.—Cunningham v. Lawson, La., 36 So. Rep. 107.

77. EXEMPTIONS — Recovery from Purchaser. — One who promptly asserts his rights to an exemption in property sold under execution may recover its value from a purchaser with knowledge of the facts.—White v. Wilson, Mo., 80 S. W. Rep. 692.

78. EXPLOSIVES — Proximate Cause of Explosion.—In an action for injuries by the explosion of dynamite, the proximate cause of her injury held the negligence of a third person in removing the dynamite, and not the negligence of defendant in storing it in the building.—Georgetown Telephone Co. v. McCullough's Admr., Ky., 80 S. W. Rep. 782.

79. FEDERAL COURTS — Dissolution of Partnership.—Where a federal court has acquired jurisdiction over the property of a partnership in a suit for dissolution, such jurisdiction is not affected by the fact that a creditor, brought in by order, is a citizen of the same state as complainant.—Bloomingdale v. Watson, U. S. C. C. of App., Fourth Circuit, 128 Fed. Rep. 268.

80. FIRE INSURANCE—Waiver of Appraisement.—It is no waiver of an appraisement that an adjuster declared that an appraisement would be useless without a statement from insured as to goods entirely destroyed.—Astrich v. German-American Ins. Co., U. S. C. C., M. D. Pa., 128 Fed. Rep. 477.

81. FISH—Conveyance of Fishing Rights.—A definite "fishing right in the adjoining sea," described in the granting clause of a royal patent as "attached to this land," held included in the grant, though the *habendum* is to have and to hold "the above-granted land," which, standing alone, might not include a fishing right.—Damon v. Territory of Hawaii, U. S. S. C., 24 Sup. Ct. Rep. 617.

82. FIXTURES—Belting in Mill.—A leather belt, which transmits the power from a stationary engine to a main shaft for the operation of the machinery of a marble mill, is a part of the realty, and is not subject to attachment and removal as personal property.—Giddings v. Freedley, U. S. C. C. of App., Second Circuit, 128 Fed. Rep. 355.

83. FORCIBLE ENTRY AND DETAINER—Action on Appeal Bond.—In an action on an appeal bond arising out of an action of forcible entry and detainer, neither the title nor the right to possession of the land is in controversy.—Stewart v. Miles, Mo., 79 S. W. Rep. 988.

84. FORGERY—Convict Bond.—One may not be convicted of forgery of a convict bond, unless it was approved by the county judge, so as to make it a valid obligation.—Crayton v. State, Tex., 80 S. W. Rep. 889.

85. FRAUDS, STATUTE OF—Parol Contract to Convey Land.—Where one receives the consideration for a parol promise by him to convey lands, and he fails to do so, he other party is entitled to damage based on the value of the lands.—Doty's Admrs. v. Doty's Guardian, Ky., 80 . W. Rep. 803.

86. FRAUDULENT CONVEYANCES — Insolvency of Debtor.—A debtor is not deprived of his right to sell or dispose of his property by reason of insolvency or embarrassed financial condition, even though a sale or disposition may hinder or delay creditors.—Mears v. Gage, Mo., 80 S. W. Rep. 712.

7. FRAUDULENT CONVEYANCES — Sufficiency of Evidence.—That a debtor's sale of his stock of goods is fraudulent may be proved from the circumstances surrounding the sale, and need not be shown by positive testimony.—New York Mercantile Co. v. West, Mo., 80 S. W. Rep. 943.

88. GIFTS—Parol Conveyance of Land.—A gift of land need not be in writing, but may be evidenced entirely by parol, and will become an equitable title, if possession be taken and improvements made on the land on he faith of the parol gift.—Shannon v. Marchbanks, Tex., 80 S. W. Rep. 860.

89. HEALTH — Services of Physician During Epidemic.—Health officers held not entitled to recover against county for services rendered in epidemic to person able o pay for them, notwithstanding Ky. St. 1899, § 2060.—Laurel County Court v. Pennington, Ky., 80 S. W. Rep 820.

90. HIGHWAYS—Collision of Vehicles.—The proximate cause of a collision between two vehicles held the negligence of the defendant in attempting to drive in the narrow space between a street car and plaintiff's vehicle, and not plaintiff's failure to take precautions to avoid the collision.—Gilbert v. Burque, N. H., 57 Atl. Rep. 927.

91. HUSBAND AND WIFE — Community Laws of Louisiana.—The community laws of Louisiana do not operate on real estate in another state or country.—Nott v. Nott, La., 36 So. Rep. 109.

92. INFANTS—Estoppel to Deny Deed.—Where, after an alleged minor grantor had arrived at age, he rented the land from the grantee for two successive years, he thereby confirmed the deed.—Ingram v. Ison, Ky., 80 S. W. Rep. 787.

93. INNKEEPERS—Powers to License.—The power to license inns and taverns is rather administrative than judicial, and the right to impose on the courts in this state rests on long continued usage.—Smith v. Borough of Highstown, N. J., 57 Atl. Rep. 901.

94. JUDGMENT—Collateral Attack.—On a collateral attack of a decree of a court of general jurisdiction by privies thereto, the decree cannot be questioned, except for want of authority over the matters adjudicated upon.—Wilkins v. McCorkle, Tenn., 80 S. W. Rep. 834.

95. LARCENY—Receiving Stolen Property.—Defendant on trial for theft held under the evidence entitled to a charge to acquit if he merely received the stolen article from the thief knowing it was stolen.—Jackson v. State, Tex., 80 S. W. Rep. 631.

96. LARCENY—Variance Between Complaint and Information.—A variance between a complaint charging the theft of a "steel trap" and an information stating that the article stolen was a "steel trap" is fatal to a conviction.—Snoga v. State, Tex., 80 S. W. Rep. 625.

97. LIBEL AND SLANDER—Justification.—It is sufficient to justify a recovery for a libel conditionally privileged, if there is any degree of actual malice in the motives inspiring it, though there may also be a lawful motive.—Cranfill v. Hayden, Tex., 80 S. W. Rep. 609.

98. LICENSE—Penalty for Failure to Take Out License.—An ordinance imposing a penalty for failure to take out a license, payment of the penalty not discharging the claim for the license tax, is not an adequate remedy for the collection of the tax.—City of Lexington v. Wilson, Ky., 80 S. W. Rep. 811.

99. MALICIOUS PROSECUTION—Probable Cause. — An acquittal does not relieve accused from establishing, in a subsequent suit by him for malicious prosecution, a want of probable cause on the part of defendant in such suit.—Burks v. Ferriell, Ky., 80 S. W. Rep. 809.

100. MANDAMUS—Railroad Aid Tax.—Mandamus will not lie to compel county commissioners to order collection of railroad aid tax, which it has been enjoined from enforcing.—State v. Board of Comrs. of Clinton County, Ind., 70 N. E. Rep. 984.

101. MARRIAGE—Common Law Form.—While a marriage at common law requires no particular form or ceremony to make it valid, enough must be said and done by the contracting parties to make a contract.—State v. Hansbrough, Mo., 80 S. W. Rep. 900.

102. MASTER AND SERVANT—Failure to Warn Servant.—Failure of the master to warn a servant as to the dangerous nature of a part of a machine was not negligence, where the servant knew of that part of the machine and the manner in which it operated.—McManus v. Davitt, 80 N. Y. Supp. 55.

103. MASTER AND SERVANT—Foreman Charged With Master's Duty.—A telephone company, which has delegated to a foreman the duty of inspecting poles before they are climbed by linemen, is liable to a lineman for an injury resulting from the failure of the foreman to perform such duty.—Cumberland Telephone & Tele-

graph Co. v. Bills, U. S. C. C. of App., Sixth Circuit, 128 Fed. Rep. 272.

104. MASTER AND SERVANT—Contributory Negligence in Coupling Cars.—In an action for death of a servant, held error not to have permitted a witness to testify as to whether a certain method of coupling an engine and "hot pot" was dangerous.—Sloss-Sheffield Steel & Iron Co. v. Mobley, Ala., 36 So. Rep. 181.

105. MASTER AND SERVANT—Defective Appliances.—In an action for injuries to a hog splitter, where two defective appliances were proved as the proximate cause, but one was abandoned, instructions using terms applying to both held erroneous.—Rendlich v. Hammond Packing Co., Mo., 80 S. W. Rep. 683.

106. MASTER AND SERVANT—Drunkenness as Contributory to Injury.—Intoxication of servant held not to preclude recovery for injuries to him, unless it proximately caused or contributed to the injuries.—Missouri, K. & T. Ry. Co. v. Jones, Tex., 80 S. W. Rep. 852.

107. MASTER AND SERVANT—Fellow-Servants.—A millwright employed in a cotton gin and a servant whose duty it was to discharge bales of cotton from the building held fellow-servants.—Consumers' Cotton Oil Co. v. Jonte, Tex., 80 S. W. Rep. 847.

108. MASTER AND SERVANT—Safe Appliances for Machinery.—A master held not liable for failure to supply a machine with the proper appliances for stopping it—Desrosiers v. Bourne, R. I., 57 Atl. Rep. 935.

109. MASTER AND SERVANT—Safe Place to Work.—In an action for injuries to a servant, mere proof that the injury was preventable by a different course of conduct is not of itself evidence of the master's negligence.—Hill v. Boston & M. R. R., N. H., 57 Atl. Rep. 924.

110. MASTER AND SERVANT—Train Orders.—A rule of a railroad company relating to running order messages held not ambiguous, but to prescribe the time when such messages became effective.—Wallace v. Boston & M. R. R., N. H., 57 Atl. Rep. 913.

111. MASTER AND SERVANT—Youth as Affecting the Question of Assumed Risk.—The youth and immaturity of a servant are not sufficient to rebut the presumption of assumption of risk, where the servant knows and appreciates the danger that he incurs.—Langlois v. Dunn Worsted Mills, R. I., 57 Atl. Rep. 910.

112. MINES AND MINERALS—Placer Mining Location.—Entry on a prior valid placer mining location to prospect for unknown lodes, when made against the will of the placer locators, held a trespass, which could initiate no title to the lode claims thus located within the exterior boundaries of the placer claim.—Clipper Min. Co. v. Eli Mining & Land Co., U. S. S. C., 24 Sup. Ct. Rep. 632.

113. MORTGAGES — Erroneous Description of Land.—The purchaser at a sale of land under a trust deed is not bound to pay the amount of his bid and accept the deed, where the land was erroneously described in the advertisement.—Jackson v. Binnicker, Mo., 80 S. W. Rep. 682.

114. MORTGAGES—Estoppel to Assert Equitable Title.—Where real property is jointly occupied by the holder of the legal title and an equitable claimant, the possession presumably is in the legal owner, and the possession of the other is not notice to a purchaser of the equitable claim.—Atlanta Nat. Building & Loan Assn. v. Gilmer, U. S. C. C., M. D. Ala., 128 Fed. Rep. 293.

115. MUNICIPAL CORPORATION—Duties of Railroad at Street Crossings.—A violation of a city ordinance requiring trainmen to sound the engine bell on approaching a street crossing, and keep it ringing till the crossing is passed, is negligence *per se*.—Reed v. St. Louis, I. M. & S. Ry. Co., Mo., 80 S. W. Rep. 919.

116. NAMES—Indictment.—Evidence that a package alleged to have been stolen by defendant was addressed to "L. Krower" held not to constitute a variance, though the indictment charged that it was addressed to "L. Krowder."—Alexis v. United States, U. S. C. C. of App., Fifth Circuit, 129 Fed. Rep. 60.

117. PARTNERSHIP—Sharing Profits.—An agreement to share in the profits of the sale of land to be purchased is not of itself sufficient to constitute a partnership.—McKinley v. Lloyd, U. S. C. C., D. Oreg., 128 Fed. Rep. 519.

118. PRINCIPAL AND AGENT — Authority of Agent to Borrow Money.—Power to borrow money on behalf of his principal may be conferred on an agent by implication from the scope and character of the business he is authorized to transact, although he is not a general agent.—Ladd v. Ætna Indemnity Co., U. S. C. C., D. Oreg., 128 Fed. Rep. 298.

119. PRINCIPAL AND AGENT—Profits Made by Agent.—An agent held severally and not jointly liable to his two principals for profits made by him in the execution of the agency.—Graham v. Cummings, Pa., 57 Atl. Rep. 948.

120. OFFICERS—Apparent Authority of Tax Collector.—Public officers cannot bind the government by acts beyond their actual authority, though within the apparent scope of their authority.—Orange County v. Texas & N. O. R. Co., Tex., 80 S. W. Rep. 670.

121. OFFICERS — Presidential Electors. — Presidential electors held state officers within Const. § 152, relative to filling a vacancy in an elective office at the next election at which state officers are to be elected.—Donelan v. Bird, Ky., 80 S. W. Rep. 796.

122. PARTNERSHIP—Use of Property.—A bill to recover land conveyed to a city by a firm for cemetery purposes, on the ground that the grantee had changed the use, failing to show that plaintiffs were entitled to the reversion, held demurrable.—Thornton v. City of Natchez, U. S. C. C. of App., Fifth Circuit, 129 Fed. Rep. 84.

123. PERJURY — Predicated on False Though Incompetent Testimony.—Perjury may be predicated on false testimony, though the witness was incompetent.—State v. Moore, La., 36 So. Rep. 100.

124. PERJURY — Subornation of Witness.—In subornation of perjury, the pleader must charge that the accused knew that the witness suborned would testify to a fact he knew to be false.—State v. Williams, La., 36 So. Rep. 111.

125. POST OFFICE — Obscene Letters.—A letter, the purport of which was such as to offend the sense of decency and chastity, held obscene, within Rev. St. U. S. § 3893, prohibiting the mailing of obscene writings, though the words were not themselves obscene.—United States v. Moore, U. S. D. C., W. D. Mo., 129 Fed. Rep. 159.

126. PUBLIC LANDS — Entry.—The joining of several claims to set aside fraudulent conveyances and entries on public lands in the same bill held not to render it multifarious.—United States v. Clark, U. S. C. C., D. Mont., 129 Fed. Rep. 241.

127. PUBLIC LANDS — Homestead Patentee —A patent issued under the homestead law relates back to the initiation of claim, and gives patented right to recover value of timber wrongfully cut thereon.—Peyton v. Desmond, U. S. C. C. of App., Eighth Circuit, 129 Fed. Rep. 1.

128. QUO WARRANTO—To Test Validity of Municipal Corporation.—Where the sole purpose of a *quo warranto* proceeding to oust from office the mayor and common councilmen of a city is to test the validity of the incorporation of the city the city is a necessary party.—State v. Huff, Mo., 79 S. W. Rep. 1010.

129. RAILROADS—Person on Track.—A person injured while walking on a railroad track as a licensee, held guilty of such contributory negligence as precluded recovery.—Batchelder v. Boston & M. R. R., N. H., 57 Atl. Rep. 926.

130. RAILROADS—Persons on Track.—It cannot be contended that public are licensed to use as a highway switchyards of a railroad, at each end of which warning notices are posted.—Koegel v. Missouri Pac. Ry. Co., Mo., 80 S. W. Rep. 905.

131. RELEASE—Joint Tort Feasors.—An instrument releasing one of two tort feasors, held not a technical release, but a covenant not to sue the person released, and therefore no defense to an action against the others.—Carey v. Bilby, U. S. C. C. of App., Eighth Circuit, 129 Fed. Rep. 203.

132. REMOVAL OF CAUSES—Jurisdictional Amount in Federal Court.—Jurisdiction of Federal Circuit Court, on removal from a state court, cannot be divested by dismissal of the bill on complainant's own motion, after filing of cross-bill, though jurisdictional amount may no longer be in dispute.—Kirby v. American Soda Fountain Co., U. S. S. C., 24 Sup. Ct. Rep. 619.

133. SALES—Acceptance of Offer.—A proposal to accept an offer for the purchase of cotton, on terms varying materially from those offered, is a rejection of the offer, and does not create a contract binding the purchaser.—Johnston v. Fairmont Mills, U. S. C. C. of App., Fourth Circuit, 129 Fed. Rep. 74.

134. SALES — Confusion of Goods.—A confusion of goods, although innocent, casts upon the one chargeable therewith the burden of identifying his own or of proving the proportionate share to which he is entitled. —Wright v. Ellwood Ivins Tube Co., U. S. C. C., E. D., Pa., 128 Fed. Rep. 462.

135. SALES—Construction of Contract.—Where a buyer of a vessel failed to offer to pay the price at a meeting held to complete the transfer, he could not thereafter rely on the seller's default in failing to transfer certain insurance policies as authorizing a termination of the contract.—Livermore v. Brauer, U. S. C. C. of App., Second Circuit, 128 Fed. Rep. 265.

136. SALES—Performance of Contract.—In an action for breach of contract of sale, a variance between the quantity sold and the quantity delivered held to authorize the buyer's refusal to accept.—Kalamazoo Corset Co. v. Simon, U. S. C. C., E. D. Wis., 129 Fed. Rep. 144.

137. SALES—Use of Article after Discovering Fraud.—Retention and use of an article after discovery of the fraud by which the sale was induced do not prevent a recovery of the damages resulting therefrom.—Hallwood Cash Register Co. v. Berry, Tex., 80 S. W. Rep. 857.

138. SALVAGE—Reasonableness of Amount of Award. —An award of $1,125 to the master and crew of a tug, consisting of nine persons, for salvage services in rescuing a derelict dumper worth $8,000 to $10,000, which had drifted 25 miles out to sea, held not excessive.—The Dumper No. 8, U. S. C. C. of App., Second Circuit, 129 Fed. Rep. 98.

139. SEAMEN—Duty of Master to Secure Surgical Aid at Nearest Port.—Failure of the master of a sailing vessel, bound for San Francisco, to put into San Carlos or Ancud to secure surgical attendance for seaman disabled in an accident while rounding Cape Horn, held not negligence.—The Iroquois, U. S. S. C., 24 Sup. Ct. Rep. 640.

140. SHIPS AND SHIPPING—Liabilities of Consignee.—A consignee, wrongfully refusing to take part of the cargo within a reasonable time after arrival, held liable for damages for the delay.—Graham v. Planters' Compress Co., U. S. D. C., S. D. N. Y., 129 Fed. Rep. 253.

141. SPECIFIC PERFORMANCE—Parol Agreement to Assign Patent.—A parol agreement to assign the right to obtain a patent for an invention is valid, and, when established by sufficient proof, may be specifically enforced in equity.—Pressed Steel Car Co. v. Hansen, U. S. C. C., W. D. Pa., 128 Fed. Rep. 444.

142. STREET RAILROADS—Persons on Track.—The right of a street car company to use the street within the lines covered by its tracks is superior to the rights of other users.—Di Prisco v. Wilmington City Ry. Co., Del., 57 Atl. Rep. 906.

143. STREET RAILROADS—Unused Franchises.—Unused franchise, granted to a street railroad company on condition of the completion of the road within a specified time, held not subject to forfeiture at the suit of an abutting owner and taxpayer.—Kent v. Common Council of City of Binghamton, 88 N. Y. Supp. 34.

144. STREET RAILROADS—Vehicle Crossing Accident.—Failure of driver of vehicle to pause until moving street car passed beyond his line of vision, so as to give him clear view of track, held contributory negligence as a matter of law.—Asphalt Granitoid Const. Co. v. St. Louis Transit Co., Mo., 80 S. W. Rep. 741.

145. TAXATION—Tax Sale.—A strip of land three one-hundredths of an inch wide, sold to one at a tax sale in consideration of his paying the taxes on lots, is too small to enforce his lien against, on his deed failing.—Phelps v. Brumback, Mo., 80 S. W. Rep. 678.

146. TAXATION—Description of Land in Petition for Tax Sale —A judgment in a suit for the sale of land for taxes is void, where it is attempted thereby to affect land not described in the petition.—O'Day v. McDaniel, Mo. 80 S. W. Rep. 895.

147. TELEGRAPHS AND TELEPHONES—Failure to Transmit Message.—In action for negligent failure to properly transmit telegram apprising plaintiff of the death of his father, certain statements of the father, shortly before his death, held inadmissible.—Western Union Tel. Co. v. Jackson, Tex., 80 S. W. Rep. 649.

148. TRESPASS TO TRY TITLE—Right to go to Jury.—A party cannot be denied his right to go to the jury, because his proof is not the best evidence, where the secondary evidence has been admitted and allowed to remain in the case.—Wilson v. Wilson, Mo., 80 S. W. Rep. 711.

149. TRESPASS TO TRY TITLE—Stale Demand.—Stale demand is no defense in trespass to try title, whether plaintiff's title be legal or equitable, if it be a title, as distinguishable from a mere equitable right to acquire title.—Betzer v. Goff, Tex., 80 S. W. Rep. 671.

150. TRUSTS — Discretionary Powers. — Under Rev. Laws, ch. 147, §§ 5, 6, a trustee appointed by the court on failure of trustee named in will to act could exercise a discretionary power vested in the trustee, and not restricted to the trustee named.—Sells v. Delgado, Mass., 70 N. E. Rep. 1036.

151. TRUSTS—Proper Parties in Action to Enforce.—Widow of mortgagor held properly joined as plaintiff in action by mortgagor's vendee to enforce a trust in relation to the property.—Phillips v. Hardenburg, Mo., 80 S. W. Rep. 891.

152. VENDOR AND PURCHASER—Abatement of Purchase Price.—Where a conveyance was of all defendant's interest and without covenant of warranty, there could be no abatement of purchase price for a partial failure of title.—Scott v. Slaughter, Tex., 80 S. W. Rep. 643.

153. VENDOR AND PURCHASER—Action to Rescind Sale of Land.—The entry of the decree on the record books of the court, making a decree rescinding a deed, answers all the purposes of registration.—Wilkins v. McCorkle, Tenn., 80 S. W. Rep. 834.

154. WILLS—Construction.—Courts will not so construe a will as to make same person trustee and beneficiary, unless testator's intent is clear.—*In re* Vreeland's Estate, N. J., 57 Atl. Rep 903.

155 WITNESSES—Election Contest.—In an election contest, certain declarations of a voter who appeared as a witness held properly admitted for purposes of impeachment.—Bailey v. Fly, Tex., 80 S. W. Rep. 675.

156. WITNESSES — Refreshing Memory of Witness.—Where a party's witnesses failed to testify as he expected them to, he could not refresh their memory by reading their testimony on the former trial, asking if it was not true.—Commonwealth v. Bavarian Brewing Co., Ky., 80 S. W. Rep. 772.

157. WORK AND LABOR—Implied Contract. — Where defendant ordered plaintiff to repair an engine which belonged to an employee of plaintiff, it being important for plaintiff's interests that it should be repaired, plaintiff was liable for the cost of the repairs.—Brinkley Car Works Mfg. Co. v. Farrell, Ark., 80 S. W. Rep. 749.